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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 15.—ORIGINAL.

NICHOLAS W. CASEY, AS RECEIVER OF THE NEW ORLEANS NATIONAL BANKING ASSOCIATION, PLAINTIFF,

VS.

COUNT GOFFREDO GALLI.

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March 17 1877
Dem overruled
Judgment for
Plff
per Curiam

SUPREME COURT OF THE UNITED STATES.

No. 15.—Original.

NICHOLAS W. CASEY, AS RECEIVER OF THE NEW ORLEANS NATIONAL BANKING ASSOCIATION, PLAINTIFF,

vs.

COUNT GOFFREDO GALLI.

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1 Supreme Court of United States, of the term of October, 1876.

NICHOLAS W. CASEY, AS RECEIVER OF THE New Orleans National Banking Association, *vs.* COUNT GOFFREDO GALLI. } Original action in debt.

Comes now the said plaintiff, by Rouse & Grant & Charles Case, his counsel & attorneys, and presenting herewith his declaration in the above-entitled cause, moves the court here upon the facts therein stated for leave to file the same, and to prosecute said action in this honorable court.

ROUSE & GRANT &
CHARLES CASE,
Counsel & Attorneys for said Plaintiff.

(Endorsed:) 1876. Octo. term Supreme Court U. S. Original, 15. Casey, receiver, &c., vs. Count Goffredo Galli. Motion for leave to file, &c. Filed 15 December, 1876.

2 *Order of court.*

On the 18th day of December, 1876, the following entry appears of record, to wit:

NICHOLAS W. CASEY, RECEIVER, &C., *vs.* COUNT GOFFREDO GALLI. }

On consideration of the motion of Mr. C. Case, it is ordered that leave be, and the same is hereby, granted to enter & prosecute this cause as an original action in this court, and that a summons issue returnable on the first Saturday in January, and requiring the defendant to plead or demur to the declaration on or before the fourth Monday of the same month. Every Monday thereafter shall be a rule-day until the issues are made up.

3 Supreme Court of the United States. October term, 1876.

NICHOLAS W. CASEY, RECEIVER OF THE NEW Orleans National Banking Association, *vs.* COUNT GOFFREDO GALLI. } Original. No.

Declaration in debt.

To the honorable the Supreme Court of the United States of America:

Nicholas W. Casey, as receiver of the New Orleans National Banking Association, plaintiff in this suit, by Rouse & Grant and Charles Case, his attorneys, complains of Count Goffredo Galli, the defendant in this suit, of a plea that he render to the said Nicholas W. Casey, in his said capacity, the sum of fifteen hundred dollars, lawful money of the United States, which he owes to and unjustly detains from him.

For that whereas, heretofore, to wit, on and before the third day of June, 1864, the Bank of New Orleans was a corporate banking institution, created and organized under the laws of the State of Louisiana, and carried on the business of banking under said laws, until on or about the first day of July, 1871, when the said Bank of New Orleans, by due and regular proceedings had and taken under and by authority of the act of Congress entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3d, 1864, changed its character and form of organization from a bank acting under the authority of the laws of said State, to that of a national banking association, organized and acting under the authority of said act of Congress, and became, and was changed and converted into a national banking association, under the name and style of the New Orleans National Banking Association, and from and after said first day of July, 1871, carried on the business of banking under the provisions of said act of Congress, and so continued to do until the fourth day of October, 1873, when it failed and suspended payment.

And thereupon the Comptroller of the Currency, after all due proceedings had, and with full, due, and lawful authority, appointed a receiver for said association, and the same was put in liquidation under the provisions of said act of Congress, (and of the acts amendatory thereof,) and plaintiff is now receiver thereof, being in all things duly and lawfully constituted, appointed, and qualified as such, under the provisions of said act.

And the plaintiff avers that by the conversion of said Bank of New Orleans into such National Banking Association, each and every holder of the shares of capital stock of said Bank of New Orleans became a shareholder of the capital stock of said New Orleans National Banking Association to the amount of his said shares, and as such subject to the liabilities imposed by said act of Congress upon such shareholders.

4 That there is due and owing by said association to its creditors large sums of money; that the assets and credits of said association are wholly insufficient to pay and discharge the debts and liabilities thereof; that it has become necessary, in order to pay and discharge said debts, to enforce the liability of the several shareholders of the capital stock of said banking association as fixed by said act of Congress, (Revised Statutes of the United States, section 5151); that, therefore, the Comptroller of the Currency, who is by law charged with that duty, has ascertained, determined, and decided, that, in order to pay said debts, it is necessary to enforce said individual liability of said shareholders, as provided by the twelfth section of said act of Congress, (Revised Statutes of the United States, section 5151;) and heretofore, to wit, on the seventh day of June, 1875, said Comptroller, in pursuance of said determination and decision, by his order in writing, in due form of law, did order and direct the said plaintiff, as receiver as aforesaid, to enforce such liability against each and every shareholder of said association, to the full amount of the par value of the shares of stock held or owned by him at the time of the failure of said association as aforesaid.

That the capital stock of said Bank of New Orleans at the time of its conversion into the New Orleans National Banking-Association, as aforesaid, and of said association thereafter, was six hundred thousand dollars, divided into twenty thousand shares, of the par value of thirty dollars each; and said Bank of New Orleans at no time had a capital of five millions of dollars.

And plaintiff avers that the defendant, Count Goffredo Galli, who is an alien, a subject of the kingdom of Italy, and is duly appointed, accredited, and recognized vice-consul for said kingdom, at the city of Philadelphia, in the State of Pennsylvania, United States of America, and now there resides, was, on the fourth day of October, 1873, (the date of the failure of said association,) the owner of fifty shares of the capital stock of said New Orleans National Banking-Association, of the par value of thirty dollars for each share; and, by reason of the premises, and by force of the statute in such case made and, provided, the said defendant became liable to pay to the said plaintiff in his official capacity as receiver as aforesaid, a large sum of money, to wit, the sum of fifteen hundred dollars; yet the said defendant, although heretofore, to wit, on the 7 day of June, 1875, and often thereafter, thereunto specially requested, hath not paid to said plaintiff said sum of fi'teen hundred dollars above demanded, or any part thereof; but to pay the same, he, the said Count Goffredo Galli, hath hitherto wholly refused, and still doth refuse.

Whereby and by force of said statute an action hath accrued to the said plaintiff, to demand and have of and from the said defendant the said sum of fifteen hundred dollars, together with interest thereon from said 7th day of June, 1875, at the rate of five per centum per annum, as damages for the detention thereof; and therefore he brings his suit.

ROUSE & GRANT &
CHAS. CASE,
Attorneys and Counsel for Plaintiff.

Filed 18th December, 1876.

5 *Subpœna.*

The President of the United States of America to the marshal of the Supreme Court of the United States, greeting:

You are hereby commanded that you summon Count Goffredo Galli, vice-consul for the kingdom of Italy at the city of Philadelphia, State of Pennsylvania, to be and appear before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, on the 6th day of January, A. D. 1877, to answer unto Nicholas W. Casey, as receiver of the New Orleans National Banking Association, in a plea of debt for fifteen hundred dollars and damages as alleged, and do you then and there make due return of this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Washington, the 21st day of December, A. D. 1876, and of the Independence of the United States the one hundred and first.

[SEAL.] (Signed) D. W. MIDDLETON,
Clerk Supreme Court U. S.

6 We accept service of this writ for the defendant.

J. M. CARLISLE.
JNO. D. McPHERSON.

JAN. 6, 1877.

I, John G. Nicolay, marshal of the Supreme Court of the United States, do hereby certify that I have served the foregoing writ by receiving from Messrs. J. M. Carlisle and Jno. D. McPherson, of Washington, D. C., of counsel for the within-named Count Goffredo Galli, vice-consul for the kingdom of Italy at the city of Philadelphia, State of Pennsylvania, their written acceptance and acknowledgement of service of this writ upon the said Count Goffredo Galli, as appears in the foregoing endorsement.

Done at the city of Washington this sixth day of January, A. D. eighteen hundred and seventy-seven.

JNO. G. NICOLAY,
Marshal.

(Endorsed:) Sup. Court U. S. 1876, Oct. term. No. 15. Original. Nicholas W. Casey, receiver, &c., plaintiff, vs. Count Goffredo Galli. Subpœna & service. Filed 8 January, 1877.

7 *Order of court.*

On the 8th day of January, 1877, the following entry appears of record, to wit:

NICHOLAS W. CASEY, RECEIVER, &C.,
vs.
COUNT GOFFREDO GALLI.

On motion of Mr. C. Case, leave is hereby granted him to file amended declaration in this cause.

8 *Stipulation.*

In the Supreme Court of the United States. October term, 1876.

NICHOLAS W. CASEY, RECEIVER OF THE NEW Orleans National Banking Association,
vs.
COUNT GOFFREDO GALLI.
Original. No. 15.

It is stipulated and agreed that any demurrers and pleas in abatement which the defendant may file in this cause may be filed without the affidavits usually required. It is further stipulated and agreed that demurrers, pleas, replications, and other pleadings which the parties hereto may be advised to file, may be filed without regard to the order in which the same may be properly pleadable, and no advantage shall be taken thereof, but all the pleadings shall be considered and 9 disposed of in the order in which they were properly pleadable, or in such other order under the direction of the court as may tend to the most speedy decision of the cause.

CHAS. CASE, *Atty. for Plff.*
CARLISLE & McPHERSON,
Atty. for Defendant.

(Endorsed:) Sup. Court U. S. 1876, Octo. term. No. 15. Original. Nicholas W. Casey &c., vs. Count Goffredo Galli. Stipulation. The clerk will please file this stipulation. J. M. Carlisle, J. D. McPherson, attys. for deft.; Chas. Case, atty. for plff. Filed 22 January, 1877.

10 *Demurrer.*

In the Supreme Court of the United States, October term, 1876.

NICHOLAS W. CASEY RECEIVER OF THE NEW Orleans National Banking Association.
vs.
COUNT GOFFREDO GALLI.
Original No. 15.

And now comes the defendant and says that the matters in the declaration contained, as the same are therein stated, are not sufficient in law for the said plaintiff to have and maintain his said action against the said defendant, and the said defendant is not bound to answer the same. And this he is ready to verify. Wherefore he prays judgment, &c.

And the said defendant shows to the court here the following causes of demurrer to the said declaration, that is to say:

11 First. That by the said declaration it appears that this defendant is bound to contribute equally and ratably with other persons to pay a large sum of money, and the sum to be contributed by this defendant cannot be ascertained without an accounting, which in this proceeding cannot be had but by bill in equity only.

Second. That the obligation of this defendant as set forth in the declaration is to contribute equally with certain others, and ratably in proportion to his amount of stock in the banking association in the declaration mentioned, to pay a large sum of money, and the declaration does not show the amount to be paid, and so the amount which would be equal and ratable cannot be seen.

12 Third. That the obligation of the defendant as set forth in the declaration is to pay into the hands of the Comptroller of the Currency a ratable portion of the amount of the debts of the association aforesaid, which may be proved before the said Comptroller, and the declaration does not show that any debts have been proved before the said Comptroller.

Fourth. That the plaintiff in his said declaration demands of the defendant a larger sum of money than the defendant is by the statute set forth in the declaration required to pay, in that the plaintiff requires the defendant to pay not only the par value of the defendant's stock, but also an additional sum by way of interest thereon.

J. M. CARLISLE,
J. D. McPHERSON,
13 *Attorneys for Defendant.*

We certify that in our opinion the following demurrer is well founded in law.

J. M. CARLISLE,
JNO. D. McPHERSON.

(Endorsed:) Sup. Court U. S., 1876. Octo. term. No. 15, original. Nicholas W. Casey, &c., vs. Count Goffredo Galli. Demurrer. The clerk will please file this demurrer. J. M. Carlisle, J. D. McPherson, attorneys for def't. Filed 22' January, 1877.

14 *Pleas in abatement.*

In the Supreme Court of the United States, October term, 1876.

NICHOLAS W. CASEY, RECEIVER OF THE New Orleans National Banking Association,
vs.
COUNT GOFFREDO GALLI.
} No. 15. Original.

And now comes the defendant and says:

1. That there is not in existence any such corporation as the New Orleans National Banking Association, as in the said declaration alleged; and that there was not in existence any such corporation at the time of the supposed appointment of the plaintiff as receiver thereof, nor at any time since. And this he is ready to verify. Wherefore he prays judgment of the said declaration, and that the same be quashed.

J. M. CARLISLE,
JNO. D. McPHERSON,
Attorneys for Defendant.

2. And for a further plea the defendant, by leave of the court, says:
That there is not now in existence, and there was not in ex-
15 istence at the time of the supposed appoint*ed* of the plaintiff as
receiver of the New Orleans National Banking Association, any such corporation as the New Orleans National Banking Association, nor has there been at any time since any such corporation in existence, because he says that the Bank of New Orleans had no power by its charter or by any act of the legislature of Louisiana, or authority given otherwise by the State of Louisiana, to change its character and form of organization to that of a national banking association under the laws of the United States, and that the directors of the said New Orleans Bank had no authority under the laws of Louisiana to convert their said bank into a national banking association. And this he is ready to verify. Wherefore he prays judgment of the said declaration, and that the same be quashed.

J. M. CARLISLE,
JNO. D. McPHERSON,
Attorneys for Defendant.

And for a further plea the defendant, by leave of the court, says:
That there is not now in existence, and there was not in exist-
16 ence at the time of the supposed appointment of the plaintiff as
receiver thereof, or at any time since, any such corporation as the New Orleans National Banking Association, because he says that the owners of two-thirds of the capital stock of the New Orleans Bank did not authorize the directors of the said bank to change and convert the said bank into a national banking association, acting under the laws of the United States, or to accept an organization certificate as such banking association. And this he is ready to verify. Wherefore he prays judgment of the said declaration, and that the same be quashed.

J. M. CARLISLE,
JNO. D. McPHERSON,
Attorneys for Defendant.

(Endorsed:) Sup. Court U. S. 1876, Oct. term. No. 15. Original. Nicholas W. Casey, &c., vs. Count Goffredo Galli. Pleas in abatement. The clerk will please file this plea.

J. M. CARLISLE,
J. D. McPHERSON,
Attys. for Deft.

Filed 22 January, 1877.

17 *Demurrer to pleas in abatement.*

Supreme Court U. S.—October term, 1876.

NICHOLAS W. CASEY, AS RECEIVER OF THE
New Orleans National Banking Association,
plaintiff,
vs.
COUNT GOFFREDO GALLI, DEFENDANT.
} Original, No. 15. Debt.

Comes now the said plaintiff, by Rouse & Grant & Charles Case, his attorneys, and as to the said three pleas by the defendant above hereof pleaded in abatement of said declaration, and each of them, said plaintiff saith that the said pleas and each of them, and the matter therein

contained in manner and form as therein pleaded, are not sufficient, nor are either of them, to quash said declaration, and that the plaintiff is not bound by the law of the land to answer the same or either of them; and this he is ready to verify. Wherefore he prays judgment
18 for want of any sufficient plea that defendant may further answer said declaration.

ROUSE & GRANT,
CHAS. CASE,
Attys. for Plaintiff.

(Endorsed:) Supreme Court U. S. Casey, receiver, &c. New Orleans National Banking Association vs. Count Goffredo Galli. Original, No. 15. Demurrer to deft.'s three pleas in abatement. Filed 29th January, 1877. Please file. Rouse & Grant & Chas. Case, attorneys for plff.

19 *Joinder in demurrer.*

Supreme Court U. S.—October term, 1876.

NICHOLAS W. CASEY, RECEIVER OF NEW ORLEANS National Banking Association,
vs.
COUNT GOFFREDO GALLI.
} Original, No. 15. In debt.

Joinder in demurrer.

Comes now the said plaintiff, by Rouse & Grant & Chas. Case, his attorneys, and saith that the said declaration and the matters therein contained in manner and form as the same are above stated and set forth are sufficient in law for him, said plaintiff, to have and maintain his aforesaid action thereof against the said defendant; and this the said plaintiff is ready to verify and prove as the court shall here direct
20 and award. Wherefore inasmuch as said defendant has not answered the said declaration, nor hitherto in any manner denied the same, the said plaintiff prays judgment, and his debt and damages by reason of the premises, as in said declaration alleged and claimed to be adjudged to him.

ROUSE & GRANT & CHAS. CASE,
Attorneys for Plaintiff.

(Endorsed:) Supreme Court U. S., October term, 1876. Original, No. 15. Casey, Receiver, &c., vs. Count Goffredo Galli. Debt. Joinder in demurrer. Filed 29th January, 1877. Rouse & Grant & Chas. Case, of counsel & attorneys for plff.

21 *Joinder in demurrer.*

In the Supreme Court of the United States, October term, 1876.

NICHOLAS W. CASEY, RECEIVER, &C.,
vs.
COUNT GOFFRIDO GALLI.
} Original, No. 15.

And the defendant saith that the said pleas of the said defendant and each of them, and the matters contained therein, and in each of them, are sufficient in law to quash the said declaration, and which said pleas and the matters therein contained the defendant is ready to verify and prove as the court shall direct, &c. Wherefore, inasmuch as the said plaintiff hath not denied, nor in any manner answered the said plea, the said defendant, as before, prays judgment of the said declaration, and that the same may be quashed.

J. M. CARLISLE,
JNO. D. McPHERSON,
Attys. for Deft.

(Indorsed:) 15, original. 1876, Octo. term. Supreme Court U. S. N. W. Casey, receiver, &c., vs. Count Goffredo Galli. Joinder in demurrer. The clerk will please file. Carlisle & McPherson. Filed 1 March, 1877.

22 *Order of court.*

On the 1st day of March, 1877, the following entry appears of record, to wit:

NICHOLAS W. CASEY, RECEIVER, &C.,
vs.
COUNT GOFFREDO GALLI.

On motion of Mr. C. Case, it is ordered that this cause be assigned for argument on Thursday, the 15th instant.

O

Supreme Court of the United States.

October Term, 1876.

N. W. CASEY, RECEIVER OF THE NEW ORLEANS NATIONAL BANKING ASSOCIATION, PLAINTIFF,

versus

COUNT G. GALLI, DEFENDANT.

ORIGINAL. No. 15.

Argument on behalf of Plaintiff by Rouse & Grant, of Counsel, on the Demurrer of the Defendant to the declaration.

Clark & Hofeline, Book Printers, 112 Gravier St.

Supreme Court of the United States.

October Term, 1876.

N. W. CASEY, RECEIVER OF THE NEW ORLEANS NATIONAL BANKING ASSOCIATION, PLAINTIFF,

versus

COUNT G. GALLI, DEFENDANT.

ORIGINAL. No. 15.

Argument on behalf of Plaintiff by Rouse & Grant, of Counsel, on the Demurrer of the Defendant to the declaration.

MAY IT PLEASE YOUR HONORS:

The substance of the special assignments under the demurrer to the declaration herein, is:

1st. That by the declaration it appears that defendant is bound to contribute equally and ratably with other persons to pay a large sum of money; and that the sum to be contributed by the defendant cannot be ascertained without an accounting, which in this proceeding cannot be had, but by bill in equity.

2d. That defendant's obligation as set forth in the declaration is to contribute equally with certain others, and ratably in proportion to the amount of his stock in the bank, to pay a large sum of money; and the declaration does not show the amount to be paid, and so the amount that would be equal and ratable cannot be seen.

3d. That defendant's obligation as set forth in the declaration, is to pay to the Comptroller, etc., a ratable proportion of the debts of the bank which may be proved before the Comptroller; and the declaration does not show that any debts have been proved before him.

4th. That the declaration demands more than the law authorizes, in that it demands judgment, not only for the par value of the defendant's stock, but a certain amount as *interest* thereon, which he is not bound to pay.

I.

The first three causes of demurrer will be considered together.

The declaration herein was drawn in accordance with the ruling of this Court, in *Kennedy vs. Gibson, et al.*, 8 Wall. 494,as will appear by an examination thereof. In that case this Court said: "It is for the Comptroller to "decide when it is necessary to institute proceedings "against the stock-holders to enforce their personal "liability, and whether the whole or a part, and if "only a part, how much shall be collected. These "questions are referred to his judgment and discretion, "and his determination is conclusive. The stockholders "cannot controvert it. It is not to be questioned in

" the litigation that may ensue. He may make it at " such time as he may deem proper, and upon such data " as shall be satisfactory to him. * * * * " Where the whole amount is sought to be recovered the " proceeding *must be at law.*"

The correctness of this ruling is manifest. The 50th Section of the National Bank Act, imposes upon the Comptroller the direction of the liquidation. Through his instrument, the Receiver—the Comptroller must take possession of the assets, and collect the debts due to the Association; he must take proof of claims against it; he must make provision for refunding to the United States any deficiency in redeeming its circulating notes; he must distribute the moneys realized by him, by a ratable dividend to its creditors; "and may *if necessary to pay the* " *debts* of such Association, enforce the individual liability " of the stockholders." He and he alone is possessed of all the data necessary to determine whether such necessity exists, and what amount will be required.

If in the exercise of his judgment in this respect he should err, no irreparable injury will follow; because the statute provides, that after the payment of all claims against it, "the remainder of the proceeds, if any, shall " be paid over to the stockholders of such Association, or " their legal representatives." And for this reason it is not necessary that his determination of the amount required should be an exact one. Said the Court in the case above cited: "It would be attended with injurious " consequences to forbid action against the stockholders,

" until the precise amount necessary to be collected shall
" be formally ascertained." "This would greatly protract
" the final settlement, and might be attended by large
" losses by insolvency and otherwise in the intervening
" time. * * * A speedy adjustment is necessary to
" the efficiency and utility of the law; the interests of
" the creditors require it, and it was the obvious policy
" and purpose of Congress to give it. * * * It is
" better they should pay more than may prove to be
" needed, than that the evils of delay should be encoun-
" tered."

As "the liability of the stockholders is several and not joint," and the demand in this case is for the whole amount, the proceeding is necessarily at law. The several stockholders when sued at law, would be entitled to a trial by jury. If upon the trial they were permitted to question the Comptrollor's decision, it would involve an examination into the progress of the liquidation, before the jury, and the result might, and very likely would be, that each jury before which a case was tried would form a different estimate of the amount which would finally be required to discharge the debts of the bank, and consequently fix a different percentage of liability to be collected from the stockholder. Thus would the principle of *pro rata* responsibility be defeated. This result must necessarily follow, unless proceedings against stockholders are delayed until every asset is realized and every demand against the bank proven.

The wisdom of the contrary doctrine established in the case cited is manifest. Of necessity any other rule would obstruct, if not defeat the operation of the law, juries would be inclined to form estimatss most favorable to stockholders, not to increase their burdens. And if time should fail to justify their favorable estimate of the value of the assets of the bank, or if the subsequent insolvency of its debtors diminished the same, the stockholders would escape the just measure of their liability.

The proceeding by Bill in Equity would not relieve the Court from this difficulty, if the Comptroller's decision was subject to attack, and an account was required. Moreover, the Comptroller is not a party to the suit, and could not be compelled to account therein; and the Receiver if required to account, could only show the amount of assets in his hands, and the amount of money paid into the treasury by him. He is not charged with ascertaining the debts of the bank, nor with the distribution of its assets.

Tested by these principles the declaration will be found to conform to the requirements of the rules of pleading. It avers the corporate character of the bank under the act of Congress; that it was duly put in liquidation under the provisions thereof; the due appointment by the Comptroller of the plaintiff, as receiver; that there is due and owing by said Association, large sums of money, which its assets are wholly insufficient to pay; that it has become necessary, in order to pay its debts, to enforce the liability of the stockholders; that the Comptroller has ascertained, determined and decided, that for such purpose it is necessary, and that he has ordered and directed plaintiff as receiver,—to enforce such liability to the full amount of the par value of their shares; and that defendant is the owner of certain shares, the par value of which is stated.

The decision of the Comptroller as to the amount of the contribution, and his direction to enforce the same, applies equally to every stockholder. The amount required is equal to the capital stock of the bank, and the pro rata of the defendant is one hundred per centum of the par value of his shares. The maxim of the law, *id certum est, quod certum reddi potest,* might be invoked here, to meet the objection of the defendant, that the amount due by the bank is not stated, if it were necessary to state it.

But as we have already seen, the decision of the Comptroller fixes the amount of the contribution, and it cannot be controverted. A statement of the data upon which he acted, or the methods by which he arrived at it, would burden the declaration with irrelevant and superfluous matter.

The objection that the declaration does not show that any debts have been proved before the Comptroller, is answered by the averment that the debts exist, and that he has determined the necessity of enforcing the stockholders liability in order to pay them. It is to be presumed from his action in the premises that he had satisfactory evidence of such debts. Nor is it necessary that the debts should be proved before him, they may be determined "by the adjudication of a Court of competent jurisdiction."

It has been contended elsewhere, and may be here, that this course of proceeding works great hardship to the stockholder; in that his liability is fixed ex parte, and that he is condemned without a hearing. But no such hardship in fact exists. It is to be presumed that the Comptroller will exercise his judgment in the premises with discretion, and that he will not arbitrarily, nor vexatiously make demands upon the stockholders. It is to be presumed that if any claims are made upon the bank, which are of doubtful validity, he will refer the parties to a "Court of competent jurisdiction" for determination; and if he should refuse to do so, or should improperly admit such claim, any stockholder whose interests might be affected thereby, would find ample remedy in a Court of equity. And all errors in judgment as to amount, are equitably adjusted upon the final liquidation.

Nor is the doctrine of *Kennedy vs. Gibson*, a new one. It is a common practice for Courts of Equity, to appoint receivers of insolvent corporations, and to direct them. to collect debts due to them, including the liability of the stockholders, and it is not necessary that they should be made parties to the suit in which the order is made. *Ogilvie et al. vs. Knox Insurance Co.*, 22 How. 380. Courts of Bankruptcy have like power to assess stockholders of insolvent corporations, and the order may be made by the Court without notice to them. *Upton vs.*

Hansbrough, 3 Bissell, 417; *In re Republic Ins. Co.*, ibid. 452.

And neither the necessity for the assessment, nor the amount, is "collaterally inquirable into, in every or any action brought to enforce payment of such assessment." *Payson vs. Storer*, 2 Dillon's C. C. Rep. 432. *Upton vs. Hansbrough*, 3 Bissell, 426.

And these principles have received the unqualified sanction of this Court in *Sawyer vs. Upton*, 1 Otto, 56, where the Court quotes *Kennedy vs. Gibson et al.*, with approval; and we feel assured that neither reason or authority can be shown, for reversing these long and well settled doctrines

II.

We will now consider the 4th ground of demurrer. We are not aware of any precedent of a demurrer to a declaration in debt, because interest is claimed as damages for the detention of the sum demaded. In this case the demurrer amounts to this; that because the plaintiff claims as interest, a sum which is *not* due, therefore he cannot recover the principal sum which *is* due.

But we waive the technical objection, as we are desirous of the opinion of the Court upon the right of the plaintiff to interest, and will therefore proceed to discuss it.

Whether the plaintiff is entitled to recover interest or not, is a question of easy solution.

Interest may be divided into that which is conventional and that which is legal.

It is legal interest that is demanded by the plaintiff. Legal interest may be defined, as damages for the detention of a sum of money after it becomes due.

In Cowen vs. Tickell, 1 Vesey, Jr., 60, the Lord Chancellor said: "From conversations I have had with the " Judges, interest is given either by contract, or in dam- " ages *upon every debt detained*." "From these words," said the Chief Justice in *Arnott vs. Redfern*, 3 Bingham, 353, "it appears there are two principles on which interest " is given in our Courts: first; where the intent of the " parties that interest should be paid is to be collected " from the terms or nature of the contract; secondly, " where the debt has been wrongfully detained from the " creditor. Our law would not do what it professes to do, " namely; provide a remedy for every act of injustice, if " it did not allow damages to be given for interest, where " a creditor has been kept out of his debt, (he using all " proper means to recover it) by his debtor."

In *Blackmore vs. Fleming*, 7 T. R. 446, interest was allowed in debt upon a judgment, by way of damages. So also in *Hillhouse vs. Davis*, 1 M. and S. 169. And in *Boddam vs. Ryley*, 2 Brown Chy. 2; and *Blany vs. Hendricks*, 2 W. Blackstone, 761, holding that an account after it is rendered and liquidated, creates an implied contract for interest thenceforward, because if it be not paid then, the debtor is guilty of a default. And the American authorities are to the same effect. *Walden vs. Sherburne*, 15 Johns, 424; *Kane vs. Smith*, 12 Johns, 157; *Barnard vs. Bartholomew*, 22 Pick. 22; *Dodge vs. Perkins*, 9 Pick.

389; *Rens. Glass Co.* vs. *Reid*, 5 Cowen, 587; *King vs. Diehl*, 9 S. and R., 409.

The obligation of the defendant to pay interest herein, is governed by the following provisions of the Civil Code, viz: "Art. 1935, (1929.) The damages due for delay in " the performance of an obligation to pay money are called " interest. The creditor is entitled to these damages " without proving any loss, and whatever loss he may " have suffered, he can recover no more."

"Art. 1938, (1932.) All debts shall bear interest at " the rate of five per centum per annum, from the time " they become due, unless otherwise stipulated.'

"Interest arising *ex mora*, is in the nature of damages " for the non-performance of a contract to pay money." *White vs. McQuillan*, 12 La. 534. *Succession of Mann*, 4 Annual, 28. "Whether the delay in the performance of " an obligation to pay money is stipulated in the contract " or not, the interest accruing on that obligation is gov- " erned by Art. (1929,) C. C." *Compton vs. Compton*, 5 Ann. 618.

See also *Barrow vs. Reab*, 9 How. 366, where it is held that under the laws of Louisiana, interest is due even upon *unliquated* demands from judicial demand.

The liability of the defendant arises *ex contractu*. When he became a share-holder he took his stock subject to the liability imposed by the statute. His admission as a member of the corporation, was upon his implied promise to share the burdens thereof, and to pay such calls as should be made upon him for that purpose. *Webster vs. Upton*, 1 Otto, 67: *Upton vs. Tribilcock*, ibid. 45.

Having thus shown the nature of interest, and of the obligation of the defendant, we will proceed to an examination of the cases, wherein these principles were applied.

In *The Hamilton and Deansville Plank road Co. vs. Rice*, 7 Barb., 157, which was a suit for calls upon subscription to stock, it was held: "The money having become due " and the defendant liable to pay it, and the amount " being a sum certain, the allowance of interest was " right." (p. 168.)

In *Northern R. R Co. vs. Miller*, a suit on stock subscription, the judgment gave interest and was affirmed. 10 Barb., 260.

" The rule at law appears to be that the shareholder is " liable for interest on the sums called in on his stock, " from the times when the calls are payable." *Sagory vs. Dubois*, 3 Sandford Chy., 466. In this case interest was awarded from the date of the Receiver's advertisement for the debtors to make payment.

In *Upton vs. Burnham*, 3 Bissell, 524, the call was payable August 15, and it was held that interest was due from that date.

In *Lake Ontario R. R. Co. vs. Mason*, 16 N. Y. Rep., 451, the action was for calls on stock, and the judgment was for the amount of the calls *with interest*. The defendant averred want of notice, but it was held not necessary, and the judgment was affirmed. (p. 464).

And in England it was held in *Huddersfield Canal Co.*

vs. Buckley, 7 Durnf. and East, 36, that interest was due upon assessments from the date of the call.

In view of all these decisions we are unable to see any reason to doubt the right of the plaintiff to recover interest. To deny the right to it, is to encourage litigation for the purposes of delay.

The inquiry remains, "when does interest begin to run?" Evidently that equality which the law seeks, can be attained only by fixing a date applicable to all stockholders. The question is one of easy solution, if we consider the principle upon which it is recoverable as deduced from the authorities before cited.

Under the ruling in *Kennedy vs. Gibson*, 8 Wall. 498, that the Comptroller of the Currency must decide *when*, and to what extent the liability of the stockholders must be enforced, it is evident that nothing was due from them on that account, until he decided these questions.

Upon his determination of the amount required and direction that the Receiver should enforce payment thereof, that amount became due, and interest should be paid from that date. And this would be in accordance with *Lake Ontario R. R. Co. vs. Mason; Sagory vs. Dubois; Haddersfield Canal Co. vs. Buckley*, and other cases above cited. No other rule will work as much equality. The defendant is apprised of his liability by the failure of the Bank, and is put upon inquiry as to the amount thereof, and the time when payable, and he must be prepared to meet his obligation in that behalf whenever the Comptroller of the Currency fixes the amount thereof.

In Louisiana judicial demand is not made by filing declaration, but by *service of citation.* Therefore to give interest only from judicial demand, would vary the liabilities of the stockholders, according to the possibilities of their being cited. And to deny any interest, would be to add to the burdens of those stockholders who promptly discharged their obligations, because if any surplus remains after payment of the debts of the bank, it would necessarily be diminished by the increased interest paid to its creditors, by reason of the default of such stockholders as delayed payment. At least the right to interest from the time the defendant was notified of the assessment, seems to be unquestionable.

If these views are correct the demurrer should be overruled.

Respectfully submitted,

ROUSE & GRANT,

of Counsel for Plaintiff.

United States Supreme Court,

OF THE TERM OF OCTOBER, 1876.

Original No. 15.

Nicholas W. Casey, as Receiver of the New Orleans National Banking Association,
PLAINTIFF,
vs.
Count Goffredo Galli,
DEFENDANT.

BRIEF FOR PLAINTIFF IN SUPPORT OF DEMURRER TO PLEAS IN ABATEMENT.

ROUSE & GRANT and CHARLES CASE,
Of Counsel and Attorneys for Plaintiff.

WASHINGTON, D. C.:
NATIONAL REPUBLICAN PRINTING HOUSE.
1877.

PRELIMINARY STATEMENT.

The record, as thus far made, discloses that this action is brought pursuant to the order of the Comptroller of the Currency to enforce the individual liability of the defendant as a share-holder of the *New Orleans National Banking Association*, a national bank that, having failed, is being wound up by the plaintiff as receiver. The Comptroller's order being that this liability be enforced to the full extent of the par value of each share-holder's shares, the suit is brought at law, as prescribed by the ruling of this Honorable Court in the leading case of *Kennedy* v. *Gibson*, *8 Wall.*, *498*.

Some averments of the declaration will be more particularly noticed hereafter; for the present it may suffice to state, that it avers the existence of a State banking corporation (the Bank of New Orleans) which was duly and regularly changed and converted into a national banking body corporate, by the name as first above mentioned, by which name, as such national banking association, it transacted a banking business from July 1, 1871, to October 4, 1873, when it failed, was duly put in charge of a receiver, plaintiff being now such receiver, &c.

There are further averments that defendant was owner of fifty (50) shares of the stock at date of the failure, that the Comptroller had determined that the full personal liability of the share-holders must be enforced, and had so ordered, &c., with all other allegations, essential, as believed, to show the liability of defendant and the jurisdiction of this court.

At the instance of counsel for defendant, an agreement has been made and filed that pleadings may be put in without regard to their legal precedence or priority, and waiving affidavits to any pleas in abatement. Under this agreement defendant's counsel have filed a demurrer to the declaration, specifying sundry objections to its substantial sufficiency, and, at the same time, three pleas in abatement. To these pleas, and each of them, plaintiff demurs generally.

The case is commenced in this court not merely because defendant's official character gave the right, nor because of the amount involved, for that is small, but rather to enable defendant's counsel at once to obtain the judgment of this tribunal upon sundry legal questions which they desire to submit on behalf of *all* shareholders of this bank. In short, it is understood that they propose to make this a "test case" as to the entire $600,000 stock.

ARGUMENT.

The present purpose is to consider the legal sufficiency of these pleas, without reference to the demurrer to the declaration; and, in fact, upon the theory, that defects in the latter are not reached by a demurrer to pleas in abatement, even though such defects be more than formal. Such would seem to be both the modern and more ancient doctrine, although we are confident we have no present occasion to invoke it.

> (*Price* v. *Grand Rapids R. R. Co.*, *18 Ind.*, *137*, which cites *Shaw* v. *Dutcher*, *19 Wend.*, *216*, wherein sundry distinctions are discussed, which we might briefly consider, but for the conviction that it is unnecessary.
>
> See, also, *1 Chit. Plead.*, *14 Am. ed.*, *p. 669*, *43 Vt.*, hereafter cited, p. 44.

In passing it may be proper to mention the rule that a demurrer to a plea in abatement need never be special. Some text-writers (as Chitty, if memory does not err) say it is good policy to assign or specify the grounds of the demurrer; but it is not necessary, as the same author states. (*Chit. Plead.*, same edition, 1254, note "*b*," which cites *Lloyd* v. *Williams*, *2 Maule & Selwyn*, *485*, where one of the judges—all concurring—so states the law.) Indeed, this rule results logically from the general principles applicable to all pleas in abatement—always rigidly applied—as that they "must be *certain to every intent*," "never repugnant nor argumentative," "leaving nothing to inference," and so full and precise as to preclude all inferences against their validity. When such strictness and precision are insisted upon, as was said by counsel in a leading case, "*form* becomes *substance*."

As there may be occasion, in the progress of this argument, to insist upon the *spirit*, if not the letter, of these rules as to certainty, fullness, and precision, we hope to be pardoned for referring to a few authorities, not for the purpose of proving that such rules *are*, or what they are, (upon these points we cannot suppose learned judges to be forgetful,) but rather to freshen their memories as to how rigidly and with what critical nicety these principles have been adhered to and enforced.

Without much regard to method we cite, first, the case of *Hill* v. *Power*, *16th Vt.*, *516*. Here a plea in abatement was held bad for *argumentativeness*. The averment in the plea was that "it did not by the officer's return to the writ appear that any true copy of said writ had been delivered by the officer serving the same to the defendant." This was held an argumentative mode of stating that defendant was not served with a copy of the writ, whereas there should have been a positive averment that defendant was not thus served.

Said the Court: "Pleas in estoppel and in abatement are not favorably regarded by the law; the former because they preclude the party from avering the truth, the latter because they attempt to defeat the action upon grounds other than the merits." "These pleas are required to set forth the grounds upon which they are based, *with the highest degree of accuracy and precision, leaving nothing to be supplied by construction or intendment.*"

Brent v. *Brent*, *43 Vt.*, *42*, illustrates with what certainty all inferences contrary to the *theory* of the plea must be shut out by what is averred. This *theory* in that instance was that in connection with the service of a given process no bond had been taken, as the law required; and the averment was that "that said officer served said process on the 27th day of March, 1869, but took no bond, as required by law, either before or after said 27th day of March." This was held bad on demurrer because it did not exclude the *inference* that the officer might have taken such bond *on* the 27th day of March.

Moss v. *Ashbrook, 12th Ark., 369,* was a suit in equity. To the bill the defendants pleaded in abatement a former chancery suit between same parties as to same subject-matter, which former suit had been adjudicated, so and so, in the lower court, "whereupon an appeal was taken to the Supreme Court, *where said appeal had not then been determined.*" Therefore defendants pleaded said former suit, adjudication, and *appeal* in abatement of the present action, &c. This plea was "set down for argument" on a general objection to its sufficiency, and upon such argument held *insufficient.*

The Court said: "Pleas in abatement delay the trial of the merits of the action, and therefore the greatest precision and accuracy are required in framing them." "They should be *certain to every intent,* and without any repugnancy. They must also be direct and positive in allegations and not argumentative." "This plea does not state specifically that the proper steps were taken to perfect said appeal, nor does it positively aver that such appeal is still pending in the Supreme Court," &c. The Court said that, "if it could be *inferred* from the allegation where said appeal had not then been determined, that it was *there still remaining* and *undecided,* such *inference* was not sufficient," &c.

Clark v. *Latham, 25 Ark., 16,* was an attachment proceeding, to which sundry pleas in abatement were interposed. The Court in passing upon the first and third say: "These pleas are intended to question the sufficiency of the attachment bond. The first denies that '*the bond*' was at the time,

&c., approved by the clerk before the attachment issued. It should have said the *attachment* bond. It might mean that by the word '*bond;*' but as nothing is to be left to implication or intendment in such a plea, it should have described the bond as the '*attachment* bond,' (p. 19.)

"So again, the third plea is that the securities in the attachment are insufficient and insolvent. This is clearly bad, because for aught that appears they may have been sufficient and solvent at the time the bond was executed, becoming insolvent since. The plea avers that they *are* (that is, at the time of pleading) insolvent. This is not enough."

The fifth plea was aimed at the writ of attachment, and averred that "the writ was not signed by the clerk, *with his own proper hand*, nor by his lawful deputy." But the Court say: "This may be true, but if he (the clerk) directed another to sign his name for him in his presence, and this was done, and he then sent the writ forth as valid, we should hold it good." And this plea was held bad because this *possible—scarcely probable—inference was not negatived.*

Other decisions of similar character could be cited, but it is needless. Those already noticed are not brought forward as peculiarly or directly applicable to the case at bar, save in so far as they illustrate the estimation in which all pleas in abatement are held by courts, and, per consequence, the rigid rules which prevail as to the effect to be given them. In several of these cases, if not all, the demurrers were *general*, (the argument of the plea in the equity suit on the general objection to its sufficiency was equivalent to an attack by general demurrer,) and, if the pleas had been to the merits, it cannot be questioned that most, probably all, of the objectionable averments would have passed scrutiny. Indeed, many of them might have been deemed sufficient, though inartificial, even if specially excepted to. But as pleadings hindering the forward march of justice, they were subjected to severer rules, and "found wanting."

Coming now to the work of framing a rule, or laying down a proposition more applicable to the pleas under consideration, and by which to test their sufficiency, we venture to think the following to be warranted, as well by the authorities quoted, as by all others we have been able to examine, viz:

Every plea in abatement directed against the case presented by the declaration should be so broad in scope, yet precise and certain in detail as to cover and answer any and all allegations of the declaration, upon the theory and verity of which the plaintiff might otherwise have had, or may otherwise have the right to stand in court; and unless such plea either *directly* denies, or, by *express*, *positive* averments avoids all such allegations, it cannot operate to quash the declaration, and must be held bad.

Upon principle, this position would seem to be sound, even though it is not in so many words adjudicated in any reported decision. For, if on comparison of the pleadings it is manifest that the declaration sets out a given fact, or a series of facts, clearly showing capacity and right on the part of the plaintiff to bring the suit, and the plea is wholly silent as to such given fact or series, it of course as wholly fails of its purpose, no matter what else it may aver, because the plaintiff still has sufficient ground to stand upon; while, on the other hand, if some inference, or intendment drawn, however legitimately, from what is averred in the plea is relied upon, as a denial of, or to avoid the force and effect of the given fact or series of them, set forth in the declaration, it is equally a failure, because, as has been seen, *inferences*, *intendments*, and *argumentative statements or conclusions* are as fatal to such a pleading as is absolute silence.

It remains to make such application as may be of the foregoing theory to the case under consideration, and by so doing it will perhaps be more clearly illustrated and comprehended.

Considering for a moment the three pleas together, it is apparent that they do not differ in the least as to the ground of abatement attempted to be set up. The material averments, or rather denials of each, are in substance these, viz:

"There is not *now* in existence, and there was not in existence *at the time of the supposed appointment of the plaintiff as receiver* of the New Orleans National Banking Association, any such corporation as the *New Orleans National Banking Association, nor has there been at any time since.*"

This is all there is of the *first* plea, save the conclusion with a *verification* and prayer for judgment "that the declaration be quashed." The *second* and *third* pleas are in substance precisely like the first, save that each attempts to give a reason for the denials set up, of which more hereafter.

Here let it be particularly noticed that the existence of the corporations in question is denied *only from and during a certain period, plainly specified*, viz: from the date of the plaintiff's appointment as receiver to the present time. There is no denial, no express attempt to deny its existence during all that prior period beginning with the day when it assumed to complete its organization as such national banking association, to wit, July 1, 1871, and ending with a date shortly after its suspension, which occurred October 4, 1873—a period over two years and three months certainly. We repeat there is no denial, no express attempt to deny that during all this period last designated it did not only exist as a *de facto* corporation, at least under the act of Congress and by the name of the New Orleans Banking Association, but that during all the same time it actually did a banking business by its said name, and as a banking body-corporate under said act.

The phrase "*express* attempt to deny" is used above because, while in both the second and third pleas the denial of the corporate existence is as specifically limited to the period above stated as it is in the first; the reasons assigned in each of those pleas for such denial are such as might and must have been as operative from the beginning as during any later time. But, if it is therefore claimed that the denial should be construed, as *intended* by the pleaders, to cover all such time, the one conclusive answer is that *intents* are of no avail in such pleadings.

The utmost that the pleader could claim on this score from said averments would be this:

> "I state facts from which it may be *inferred* that this pretended corporation no more existed during this earlier period than it did during the time when its existence is positively denied; therefore I ask that my denial be construed as co-extensive with the facts upon which it is predicated."

Plainly, this would be urging the sufficiency of the most unequivocally argumentative pleading; it would be demanding that an unexpressed *possible* inference be first understood as intended, and that then it should stand as for a positive averment!

Further on it will be shown that these averments of fact in the second and third pleas afford no sufficient basis for denying the corporate existence *at any time*, but are specially of no avail as ground for such denial during the period limited in the respective pleas.

Turning now to the declaration we find in it the following allegations:

> "1st. That on and before June 30, 1864, the *Bank of New Orleans* was a corporate banking institution, created and organized under the law of *Louisiana*, and carried on business of banking under said State laws until the first day of July, 1871, *when said Bank of New Orleans, by due and regular proceedings, had and taken* under and by authority of the act of Congress entitled, &c., (we call it "for short," as a later law does, "the *National Bank Act*," vide act of June 20, 1874, section 1,) changed its character and form of organization from a bank acting under the authority of the laws of said State to that of a national banking association, *organized and acting under the authority of said "national bank act," and became and was changed and converted into a national banking association, under the name and style of the* NEW ORLEANS NATIONAL BANKING ASSOCIATION; *and from said 1st day of July, 1871, carried on the business of banking under the provi-*

sions of said last-named act of Congress, and so continued to do until the fourth (4th) day of October, 1873, when it failed and suspended payment."

"2d. Thereupon the Comptroller of the Currency, *after all due proceedings had, and with full, due and lawful authority*, appointed a receiver for said association, and the same was put in liquidation under the provisions of said national bank act, (and the acts amendatory thereto,) and plaintiff is now receiver thereof, being in all things *duly and lawfully constituted, appointed, and qualified as such*, under the provisions of said act."

Other proper averments follow, as to the capital of the bank, its shares, insolvency, the finding and order of the Comptroller that all share-holders must be called upon to respond to the amount of the par value of each one's shares, the fact that defendant owned fifty shares at date of the suspension, his official position as consul, &c., &c.; but only those above quoted are for the present essential to this discussion. Precisely the date of plaintiff's appointment as receiver does not from the declaration appear. It does appear, however, that it resulted from the failure of the bank, and consequently could not have preceded that event which transpired October, 4, 1873.

For the purpose of this argument it may be conceded that the appointment was cotemporaneous with the failure. Assuming this to be true, we come back to the material fact, that, exactly at this date, *not one hour earlier*, and from thence to the present time, *and during no other period*, is the existence of the New Orleans Banking Association, as a body corporate denied, *or even questioned*, by the defendant's pleas. But the declaration shows that *for two years and three months prior to October 4, 1873, this association, by that name, had existed as a corporate body*, under the national bank act, and as such corporation, and by such name, and, during all that time, transacted business as a bank; and this state of things is nowhere denied by either of defendant's pleas, but *stands a fact confessed of record by the silence of each and all of them.*

How, then, stands the inquiry? Why, the declaration discloses such a corporate organization by the *New Orleans National Banking Association*, by that name, from July 1, 1871, to October 4, 1873, as gave it the right to stand in court, in this or any court, having otherwise necessary jurisdiction, and such corporate existence during that period, is not only not denied by the pleas, or either of them, but stands confessed on the record. It is hardly necessary to stop here to remark that the failure of the bank did not destroy its corporate existence or rights, in this regard, and that upon the appointment of plaintiff as receiver the right of the bank to sue inured to him. (See *Kennedy* v. *Gibson*, 8 Wall, 498; *Bank of Bethel* v. *Pahquioque National Bank*, *14 Wall*, *388*, and other subsequent cases in this court.)

What follows? At once it accords with sound reason that when a corporate existence, with all its incident rights, is established, it is presumed, with all such incident rights, to continue, as is presumed as to a residence, a copartnership, a *life*, for seven years, or almost any established state of affairs. (See 3d Metc., (Mass.,) 199; 40 Vt., 615; 41 N. H., 177; 8 Alabama, 96, and 27 ditto, 618.)

Accordingly, the rule of pleading clearly is, that when a corporate existence, even *de facto*, with assertion and exercise of corporate powers, is shown, *or admitted*, a plea that denies its *subsequent* existence *must show how and why it has ceased to be*, or it is of no avail. A mere denial of such existence is not sufficient. This is stating the proposition almost in the language of adjudicated cases. Thus, in *Heaston* v. *Cincinnati R. R. Co.*, 16th Indiana R., on p. 279, the Court say:

> "When the answer (plea) denies the existence at the commencement of a suit of *a corporation which is shown once to have existed*, such an answer (plea) must particularly set forth the manner in which the corporate powers have ceased."

It scarcely need be remarked that the rule must be the same, whether the plea seeks to controvert the corporate existence at the date of the commencement of a suit, *or at any* *other time* subsequent to *a* date when its existence is an unquestioned fact, or when it is admitted by some act of the defendant.

Therefore, in *Sutherland* v. *Lagro, P. R. Co., 19 Ind., 192*, which was a proceeding to enjoin the collection of a judgment by a corporation, on the theory that it was no longer *in esse*, *Worden, J.*, says, p. 194, "the corporation *once having had a legal existence*, it was necessary that *the pleading should show and set forth particularly the manner in which it had ceased to be.*"

A class of very numerous cases in which the principle of law above propounded is practically applied is that in which, the corporation being the plaintiff, some act of the defendant, at some prior time, is held to be a recognition of the corporate organization at such date, (such act sometimes being held to *estop* him to deny the corporate existence, and sometimes being taken merely as an admission of such existence, at its date,) and the defendant sets up a denial of the corporate *esse* at any time subsequent to such act. In all such cases the courts say defendant's pleading must set forth particularly the facts relied upon to justify such denial.

Such cases abound in the *Indiana Reports*, arising largely, though not exclusively, first from her earlier plank-road system, and later from that network of railroads that has iron-clad the State.

In addition to the two decisions already cited, the following are perhaps equally clear and explicit:

Judah v. *Am. Live Stock Co., 4 Ind., 333.* X
Brookville, &c., Turnpike Co. v. *McCarty, 8 Ind., 392.*
Ensey v. *Cleveland, &c., R. R. Co., 10th Ind., 178.*
Fort Wayne Turnpike Co. v. *Deam, Ibid., 563.*
President, Trustees, &c., ads. Beaver, 34 ditto, 245.
Same v. *Hamilton, Ibid., 536.*
Ransom v. *Priam Lodge, &c., 51 Ind., 60.*
Also, the earlier and leading case in that State of *John et al.* v. *Farmers' and Mechanics' Bank, &c., 2d Blackf., 367.*

X Error of Copyist – Good as to estoppel of Shareholders &c &c further on –

Many other decisions of the same tribunal, to the same effect, could be named. In some of these cases the Court go so far (and it is presumed such is the theory of all) as to say the pleading must state facts showing a *legal demise* of the corporation. The reason for this ruling is very clearly given in the case in 2d Blackford, and repeated in more recent decisions not only in Indiana, but in several other States as well. (See, also, *Angell & Ames on Corp.*, sec. 636, and the cases cited in note 5.)

It is hardly necessary to refer to many analogous cases in the decisions of other State courts. Three or four must suffice. In *Ohio & Miss. R. R. Co.* v. *McPherson*, 35 Mo., 13, the Court decided that "when a party subscribes for stock of a corporation he is estopped to deny the corporate existence at that date, and that such existence *being once admitted*, nothing short of a judgment of ouster, in a direct proceeding, could be set up by defendant to defeat the action of the corporate officials."

In the *Congregational Society, &c.*, v. *Perry*, 6 N. H., 164, the Court said, "The giving of the note by defendant was an *admission* of the corporate existence at that date, and he cannot *now* be permitted to question it." This is stating the proposition in stronger language than we have insisted upon, put perhaps no more was intended than an assertion of the general principle.

The case of *Jones* v. *Bank of Tennessee*, *8th B. Monroe*, *122*, very clearly states the general proposition under consideration, and is besides quite decisive of other questions presently to be noticed. The suit was upon a note payable to the bank by its corporate name, and there were pleas on the part of defendant denying the corporate existence subsequent to the date of the note, and at the commencement of the suit. These pleas, or at least one of them, attempted to show how and why the corporation had ceased to be. Plaintiff demurred.

In passing upon the defense thus set up the Court say: "The second plea alleges that the charter of the bank had been forfeited before the commencement of this suit, and that there was not at the time of its commencement any such corporation in existence. A debtor to a corporation cannot absolve himself by alleging a forfeiture of its charter in general terms. A forfeiture can only be established by a direct proceeding instituted for that purpose, and until so established cannot be relied upon collaterally. It is, however, contended that the additional averment in the second plea, that there was no such corporation in existence at the time the suit was commenced, presents a substantial defense to the action. By executing the note to the corporation defendants were estopped to deny its existence at that time, (citing cases.) If its existence had terminated before the commencement of the suit the plea should have averred the facts relied upon as producing this termination to enable the Court to decide whether or not they had this effect. This the plea evidently attempted to do by alleging a forfeiture of the charter, and a consequent cessation of the corporate existence. As that part of the plea which alleged the cause of the non-existence of the corporation was bad, *the balance of the plea, which contains a mere deduction, from the fact previously alleged, must be regarded as equally defective.*"

Here the argument may properly pause while we dispose of the defendant's first plea, still holding it to the test of our leading proposition in the light of the foregoing authorities.

As already appears, this plea is merely a naked denial of the corporate existence of the bank, from the date of plaintiff's appointment as receiver to the present time, leaving entirely unanswered and unnoticed the alleged facts of the declaration that for more than two years prior to the commencement of the period to which the denial of the plea is specifically limited there had been such a corporate existence, with a complete organization, *de jure* in fact, and during all this prior period doing business as a banking association under the national law. These facts appeared of record in the case. It was material to the sufficiency of the declaration that they should appear, for only by averring a prior State organization, and its subsequent change to, and organization as a national association, under the national bank act, could the pleader show a condition to justify and legalize shares of thirty (30) instead of one hundred dollars each in a national bank. True, it was not material that the organization, after the change, should have so long continued, but the consummation of such change *was* material, and was, therefore, averred. (*See National Bank Act, R. S., Sections 5139 and 5154.*)

Now, with this narration before him, there was but one of two modes by which the defendant could frame a valid plea in abatement predicated upon a denial of the corporate existence at a date subsequent to such change, or at the commencement of the suit, viz: First, it is conceded that, so far as the present theory applies, he might have denied that there was ever any corporate existence of the New Orleans National Banking Association. Had this first plea set up that "there is not now, *nor has there at any time heretofore been*, in existence any such corporation, &c., it may be admitted that a demurrer would have been dangerous. It would then have contained the *express denial* of those facts which constitute a standing ground for plaintiff in court, insisted upon by our general proposition. Secondly. Failing to set up any such general denial, it only remained for defendant to aver such facts as would show an actual demise of the corporation at some date subsequent to that of its admitted existence, and prior to the commencement of the suit. Thus the plea would have stated facts in *avoidance* of the plaintiff's standing ground, as insisted upon by our general proposition, conforming, by so doing, to both the letter and spirit of the decisions cited.

Only in one of the two foregoing modes was it practicable for defendant to plead *nul tiel corporation* in abatement in this action. But, instead of adopting either, this first plea must be construed as though it read thus: " This defendant doth not deny, but admits that the said New Orleans Banking Association was organized, and did exist and transact business as a body corporate as in said declaration averred, and until the failure and suspension thereof, as therein specified; but defendant avers that there is not now, nor was there at the date of said plaintiff's supposed appointment as receiver, nor has there since been, any such body corporate as said New Orleans Banking Association," &c.

This is stating the plea according to *its legal effect*, quite as favorably as the record will warrant, and only such statement of it is necessary to make its insufficiency palpable and incontrovertible.

We feel confident that as to this first plea we might safely rest the argument here, and for the present will do so, though there is another ground of objection to it, as well as to the other two, fatal, as is believed, to each and all, which will be noticed in the sequel.

SECOND AND THIRD PLEAS.

Coming now to consider the second and third pleas, it may be premised that the argument thus far advanced and, the authorities invoked, show these to be as insufficient as is the first.

Before proceeding to a separate examination of each it may be further remarked that the last decision cited (*Jones et al.* v. *Bank of Tennessee, supra*) is specially applicable, and furnishes a simple rule for testing both. It is also to be remembered that the denial, forming the ground of abatement in each of these pleas is precisely the same as in the first, from which they both differ only in that they aim to comply with the rule, as propounded in the Tennessee Bank case, by giving facts from which they would have the Court infer a justification of the denial, while they differ, one from the other, in the facts thus set forth. If the facts thus averred form no legal basis for the denial thereupon sought to be predicated, then, according to the authority last mentioned, the pleas are wholly bad.

Second Plea.

Considering separately the second plea, a transposition of its averments more clearly exhibits its legal intent and purport. Thus transposed, it reads as follows:

"Defendant avers that the Bank of New Orleans had no power by its charter, or by any act of the Legislature of Louisiana, or authority given otherwise by the State of Louisiana to change its character and form of organization to that of a national banking association under the laws of the United States, and that the directors of the said New Orleans Bank had no authority under the laws of Louisiana to convert their said bank into a national banking association. Therefore, defendant says that there is not now in existence, and there was not in existence at the time of the supposed appointment of the plaintiff as receiver of the New Orleans National Banking Association, *any such corporation* as the New Orleans National Banking Association; nor has there been at any time since any such corporation in existence, and this he is ready to verify, wherefore," &c.

This is simply giving the plea its true legal form, according to the intended effect, without changing a word, save to substitute "*therefore*" for "*because*," the meaning, as used, remaining the same.

At first glance it must appear to the Court that the plea comes most emphatically within the spirit of the ruling in the *Tennessee Bank Case*, (8 B. Mon.;) and in the light of this case alone it must be adjudged bad, unless some authority can be produced holding that notwithstanding the general provisions of the national bank act granting leave, no State bank can be changed to a national one without the assent of or authority from the State! Startling as this proposition may be, if it is not the theory of this plea we wholly fail to comprehend it. At the same time, we have to confess ignorance of any such law; and what is more, and possibly worse, we must own to such dullness as to be confident no such law exists!

This plea makes no attack upon the corporate organization, based upon the national law. On the contrary, so far as it is concerned, it is to be taken as conceded that in the organization that was attempted and effected, every requirement of the national bank act was carried out to the letter. The power of Congress to enact this national law, taken as a whole, can no longer be questioned; and if there is room for doubt as to the constitutionality of any particular provision, probably there is scarcely one less free from such doubt than is that section (R. S., sec. 5154) which provides that "any bank incorporated by special law, or any banking institution organized under any general law of any State, may become a national association under this title, by the name prescribed in its organization certificate," &c.

If, while inaugurating a national banking system and currency, the Congress had discriminated against existing State banks, by prohibiting them from all participation in the privileges granted, thus subjecting all capital then invested in banking to the competition of the new and favored system, it would certainly have constituted a severely unjust, if not an unconstitutional feature of the law; but the existing provision, as above quoted, preserves the equity of the system; and Congress having thus definitely spoken, it is difficult to see how State legislation could either enlarge or limit the franchise granted, if attempted.

Here, therefore, for the present, we dismiss this plea, only again noting that while the reason by it assigned is such as might, perhaps, more appropriately have been averred in denial that there was **EVER** any national organization of this bank, still the fact remains that such reason *is* averred in denial of such organization only from a certain date (long subsequent to the actual change) to the present time; and it may be prudent to repeat, also, that if it is claimed that, because the reason averred would better warrant an allegation that there *never was* any such corporation, the denial should therefore be construed as intended to be thus comprehensive, to do this would be to greatly enlarge the scope and effect of the plea, *by mere inference and intendment*, and to sustain pleading so baldly argumentative as could scarcely be permitted in a plea to the merits, and *never* in a dilatory plea. To avoid further repetition, it is also noted here, that these remarks apply no more to this than to the third and last plea, which we pass now to consider.

Third Plea.

Here, again, transposition will be of service. According to its intended legal effect, the third plea reads thus, (formal commencement omitted:) "The defendant avers that the owners of two-thirds of the capital stock of the New Orleans Bank did not authorize the directors of the said bank to change and convert said band into a national banking association under the laws of the United States, or to accept an organization certificate as such banking association." Therefore, defendant avers that there is not now in existence," &c., (making same denial in words, *and as to the time*, as first and second pleas.)

At the outset, it is of no small importance to observe what this plea does *not*, as well as what it does aver.

First. It does not aver that two-thirds of the stock holders of the Bank of New Orleans were *opposed* to the change to a national association—only that they failed to give the technical assent specified in the law. (R. S., sec. 5154.)

Secondly. It does not aver that defendant, if at that time a share holder, was oppossd to such change. For aught that appears he might have been a *promoter* of the change, and, therefore, estopped by his own action from subsequently questioning its validity.

Thirdly, and specially. It does not aver that a majority of the directors did not certify to the Comptroller that the owners of two-thirds of the capital stock had authorized said directors to make such certificate, and to change and convert the bank into a national association, as by the same section (5154) they were empowered and required to do. *There is no denial that the directors did make such certificate in due form.*

Fourthly. There is no denial that the Comptroller *received* such a certificate *duly acknowledged*, (see R. S., sec. 5135,) and all other proofs and documents required by law, preliminary to his issuing the final authorization certificate, and particularly the sworn statement of the said directors, and the president and cashier of said bank, that all the requirements of law had been complied with as specified by section 5168 of the national act; and—

Fifthly. There is no denial that the Comptroller did issue the final *authorization certificate* prescribed by said national act, (sec. 5154,) thus completing the change to a national body corporate *from the date of the organization certificate.* (See R. S., sec. 5136.)

That the plea would have been good if it had contained all these additional averrments and denials, is by no means conceded; but that it would have been materially strengthened by incorporating them, or at least some of them, and is fatally weak without them, a very cursory examination of the national bank act will demonstrate.

Finding in the declaration the uncontradicted, *confessed* averrment, that on, or about July 1, 1871, the New Orleans Bank, "*by due and regular proceedings had, and taken*, under the national bank act, was changed and converted into a national banking association, by the name," &c., the inquiry is, what is implied in the phrase "*by due and regular proceedings had and taken?*"

Let the national act answer. To the organization of a national banking association, it is required—

First. That there shall be executed and filed with the Comptroller of the Currency *articles of association* as prescribed. (R. S., sec. 5133.)

Second. By section 5134, there must be executed an *organization certificate*, specifying the name, place of business, amount of capital, number of shares, name and residence of of share holders, and number of shares of each, and the certificate must conclude by stating that it is made to enable such persons to avail themselves of the advantages of the act.

Third. By section 5135 it is prescribed that this certificate must be acknowledged before the judge of some court of record, or a notary public, and it shall be authenticated, together with the acknowledgment, by the seal of said court or notary, and then transmitted to said Comptroller, "*who shall record and carefully preserve the same* in his office."

Fourth. Thereupon, section 5136 provides that upon duly making and filing such *articles* and *organization certificate*, the association shall become, as from the date of the execution of such certificate, a *body corporate with powers to sue, &c.*, but—

Fifth. Although thus made a body corporate, it cannot do banking business until the provisions of section 5168 are complied with, to wit:

The Comptroller must be notified that at least fifty per centum (50) of the capital stock has been paid in; the president, cashier, and majority of the directors must furnish him a statement, verified by their oaths, that every requirement of law has been fulfilled, and the Comptroller must himself make such examination as shall fully satisfy him upon this point, and thereupon—

Sixth. By section 5169, after all such information, and after the examination and report of a special commission, if so ordered, "if the Comptroller is satisfied, &c., he shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business." (This last is called for short the "*Certificate of Authority*," and is the final paper when an *original* national bank is put in operation.)

When a State bank is to be changed into a national one, then—

Seventh. Section 5154 prescribes that "the articles of association and the organization certificate may be executed by a majority of the directors of the State bank, *and the certificate shall declare that the owners of two-thirds of the capital stock have authorized the directors to make such certificate*, and to change and convert the bank into a national association." This section further enacts that "a majority of such directors, after executing the articles and organization certificate, shall have power to execute all other papers," (for example, the sworn statement of the bank officials,) "and to do whatever may be necessary to make its organization perfect as a national association." It permits the shares to remain unchanged and the old directors to hold until new ones are elected, and then prescribes that "when the Comptroller has given to such association a certificate under his hand and official seal that the provisions of the act have been complied with, and that it is authorized to commence the business of banking, (the *certificate* of *authority* as provided in section 5169,) the association shall have the same powers and privileges, and be subject to the same duties, responsibilities, and rules, *in all respects*, as are prescribed for other associations originally organized as national banking associations, *and shall be held and regarded as such an association.*"

These references to, and quotations from, the law fully answer the inquiry propounded, and declare that "*by due and regular proceedings had and taken*" was and is implied that, 1st. Before July 1, 1871, a majority of the directors of said Bank of New Orleans had made and filed the required articles and organization certificate, and *in the latter had duly stated that two-thirds of the owners* of *the capital stock had authorized the certificate aud conversion.* 2d. That a majority of such directors, with the president and cashier, had furnished the Comptroller their statement, *under their solemn oaths*, that they had complied in every respect with the law. 3d. That the Comptroller had himself inquired and became satisfied that "every jot and tittle of the law had been fulfilled." And 4th. Thereupon the Comptroller had issued to said association the certificate of authority *which made such association thenceforth a national body corporate and bank.*

Is it not apparent how much more specious at least this plea would have been if it had denied the making of any organization certificate, or had denied that the directors certified to the assent of two-thirds of the stockholders, or that any sworn statement was furnished by the bank officials, or that any certificate of authority had ever been issued by the Comptroller? And is not the silence of the plea on all these points pregnant with presumptions fatal to its sufficiency?

But even this view need not be strenuously pressed because, as already stated, as the pleadings are, it stands an admitted fact that *all these things were done and performed prior to July 1, 1871*, from which date to the time of plaintiff's appointment as receiver it is not denied by this or any plea that the New Orleans National Banking Association did exist as a national corporation; and therefore it is submitted the defendant cannot now collaterally go behind the Comptroller's certificate, nor even the *organization certificate* to set up this one alleged preliminary defect, *in direct contradiction of such organization certificate*, as proof or reason why the corporation has *since* ceased to, and does not now, exist.

Even upon the theory that this plea and the second one also were designed to deny any original consummation of the corporate organization, it is submitted that with all these presumptions arising against him from the face of the record, showing the existence for a considerable period of a corporation *de facto*, at least, under a law authorizing one *de jure*, and during all this period exercising its legitimate corporate functions, neither the defendant nor any individual suitor can be permitted to impeach the corporate capacity by urging preliminary defects back of the certificate of authority. This would seem to be a sound rule upon general principles, without regard to any special relation of defendant to the corporation.

Taggart v. *Md. R. R. Co., 24 Md. on p. 596.*
Wright v. *Selby, 16 B. Monf., 4.*
Cochran v. *Arnold, 58 Pa. St., 399.*
Rice v. *Rock Island R. R. Co., 21 Ill., 93.*
And several of the cases heretofore and hereafter cited.

In *Cochran* v. *Arnold*, the plaintiff attacked the corporate organization, seeking to make the shareholders liable individually in assumpsit.

But the court (*Strong J.*) said :

"If the certificate recorded" (showing the corporate organization) "is false, or if the law has in any particular been violated, the Commonwealth has a remedy by *quo warranto*, as in any case where corporate privileges have been obtained by fraudulent means. But until the franchise *claimed* and *used* has been directly adjudged not to exist, there is a corporation *de facto*, at least. If there is anything settled, it is that the existence of a corporation *de facto* cannot be inquired into collaterally."

Rice v. *Rock Island R. R. Co.*, 21 Ill., 93, was a suit brought for installments of stock; defense attempted was that the corporation had not complied with sundry requirements of the law as to its primary organization. *Per curiam.*

"The party ought not to be permitted in this collateral way to question the organization of the company.

If it has assumed to exercise corporate powers before it had a right to do so, if it has usurped franchises, that should properly be inquired into by a direct proceeding, if in every suit brought to enforce its rights the company must come into court prepared to prove, over and over again, that its organization was formal and proper, it would lead to hindrances and embarrassments *most intolerable.*"

Language equally emphatic could be quoted from other decisions. See also *Jones* v. *Dana*, 24 Barb., 395; *Chester Glass Co.* v. *Dewey*, 16 Mass., 94; *Buffalo R. R. Co.* v. *Cary*, 26 N. Y., 75; *Thompson* v. *Candor, 60 Ill, 244.*

Take another view of this plea.

Defendant was a shareholder in this bank at date of suspension certainly, (of which more anon,) and for aught that appears, he was so at the date of the change. Considering the certainty required in dilatory pleading, can it be permitted him to question the change, in manner as attempted, without either a denial that he was then a member, or, if a member, an averment that *he* did not assent and has never assented thereto? What though two thirds of the owners of stock did not consent to the conversion? *Non constat*, but that defendant did and was even active in promoting it, or that he subsequently acquiesced; and in either event, he would be estopped by his own action. *Danbury and Norwalk R. R. Co.* v, *Wilson, 22 Conn., 435; Camp* v. *Byrne et al., 41 Mo., on p. 435.* Is there not something, at least, nearly akin to a *negative pregnant* in the plea, as framed?

But, as already suggested, it is certain that defendant was a shareholder in this national association at the date of its suspension. The material averment of the declaration to this effect, without which there would be no case for the plaintiff in this or any court, is not denied by any of the pleas, *It stands confessed.* One of two facts results. Defendant was either a member of this banking corporation before its assumed conversion to a national association and continued to be thereafter, or he became such member subsequently to such change. If he was a member at the date of the change, surely he cannot be permitted to impeach that proceeding, unless it transpired contrary to his will, or without his knowledge, which vital condition nowhere appears.

On the other hand, if he subsequently became a share holder, continuing to hold his shares until the crash, his lips are sealed by his own action against any denial of the corporate powers. By accepting the stock, even if it came to him by descent, or bequest, he recognizes the corporate existence. If he bought it, he so recognizes it, as a contractor. By continuing to hold the shares he told the world there was such a corporation. To permit him to deny it now, would be to sanction a fraud upon the public.

This one point is decisive of all the pleas, and is insurmountable. It is sustained by the soundest logic, by many of the cases already cited, and by scores of others. We cite only the following:

Slocum v. *Providence Steam, &c., 10 R. I., 112.*
Jones v. *Cin. Type Foundry, &c., 14 Ind., 89.*
Hubbard v. *Chappel, 14 Ind., 603.*
Board Comm'rs v. *Bright, 18 Ind., 93.*
Brownell v. *Ind. & Ill. R. R. Co., 18 Ind., 68.*
Black River & Utica R. R. Co. v. *Clarke, 25 N. Y., 208.*
Erie & Waterford Plank R. Co. v. *Brown, 25 Pa. St., 156*
White v. *Ross, 4 Abbotts, N. Y. Court of App., 589.*

Thus far had this argument progressed when the writer received a letter from associate counsel in New Orleans, Messrs. Rouse & Grant, calling attention to the case of

Thatcher v. *West River National Bank, 19 Mich., 196.*

It would seem to be decisive; for the doctrine clearly deducible from the opinion of the Court is that whenever it appears, or (to adapt it to the present case) when the presumption remains uncontroverted, that the Comptroller of the Currency has issued his *certificate of authority*, no court can (collaterally) go behind it to inquire into the sufficiency of the evidence or documents upon which he acted. *His decision is conclusive.*

Finally. Conceding that all the foregoing propositions (save, of course, the main one) are insufficient, this last is submitted as unanswerable, viz: Considering the liabilities imposed upon shareholders of an insolvent national bank by the national act, it is not permissible for defendant to demand an abatement of this suit upon the grounds set up in these pleas, or either of them. What do these pleas deny, we ask once more? Simply the corporate existence of the bank from the date of plaintiff's appointment as receiver to the present time. *This and nothing more.* This appointment was subsequent to the suspension, for it resulted from it. Therefore the corporate existence at the date of the suspension is *not* denied. It is not denied that at this last date defendant was a shareholder. Now, what if it be true that sometime between the date of the suspension and that of plaintiff's appointment, the corporate powers of the bank did terminate, (*and this is the utmost that can be claimed from the pleas,*) was the defendant thereby absolved from liability?

Granting, even more than can be claimed, that sometime between those two dates the corporate franchises of the bank had been dissolved forever by the decree of a proper court, did not defendant's liability remain in full force? And if so, what can it avail him to set up such dissolution when suit is brought to enforce such liability? What matters it to him if the corporation be dead so long as it is manifest that it was alive when it failed, and he was then an owner of its stock? Are not the denials of the pleas utterly immaterial? (*See National Bank* v. *Colby*, *21 Wall., 609.*) To our minds this argument is insurmountable.

With more than ordinary confidence we come to the conclusion that our demurrer to each and all of the pleas is well taken, and must be sustained.

Respectfully submitted:

CHAS. CASE,
And ROUSE & GRANT,
Of Counsel and Attorneys for Plaintiff.

NOTE.

(Adding nothing to the argument.)

At the conclusion of a discussion "too long drawn out," but which the writer has not time now to abbreviate, two or three reflections and reminiscences press so earnestly for mention that at the risk ot seeming to assume an intimacy with honorable judges, of which he would be but too proud, but which does not exist—above all at the risk of an apparent exhibition of pedantry which he *knows* is not warranted in fact, and hopes will not be imputed—he feels constrained to yield to the impulse.

It was not to be anticipated, nor was it entirely desirable, that the honored science and profession of the LAW, as practiced and administered in judicial tribunals, should escape the visitation of that spirit of innovation and change that has been a marked characteristic of the century. That it did not escape, that in no department of civil Government have more sweeping and radical changes, at least in names and forms, (less frequently in substance,) been inaugurated than in the practice and administration of *law*, is now history. That many members of the profession who had toiled persistently and long to attain that mastery of the principles and even *forms* of pleading so indispensable to success under the old *regime*, looked upon the new order of things with distrust, and parted company with familiar and venerable precedents as they would have parted with intimate friends, is undeniable.

But resistance was futile. In the domain of law, as elsewhere, the spirit of the age was, "Let old things pass away and all things become new."

Thus was it, that many years ago, in all of the States where it was the writer's lot to pursue the profession, codes of practice, with statutory forms of pleadings and procedure had superceded those common law precedents which were the guides of his earliest experience at the bar, and which had been sanctioned, *almost sanctified*, by ages of use; and for a quarter of a century it has not devolved upon him to discuss pleadings intended to conform to and be governed by the olden-time rules.

Remitted to that duty in the case at bar, (itself in some sort an anomoly in this august tribunal—sole one of its kind that has appeared on the calendar within the last fifty years,) the labor, though tedious, has been scarcely other than a pleasure, inasmuch as each successive step has seemed, as it were, like the uncovering of a face long since sorrowfully, but lovingly laid away forevér—"Ashes to ashes, dust to dust." And if, in any degree, a similar emotion should be awakened in the mind of any one doomed to the duty of reading what is written, it may, to some extent, mitigate wrathfulness at the inordinate length of the argument.

Finally, it is but holding in due remembrance and reverence the mighty men of earlier ages to add that while the pleadings in this case purport to be drawn in substantial conformity to the rules and precedents by them taught, yet in the foregoing discussion as to the sufficiency of some of these pleadings it is noteworthy that the larger number of authorities cited are *cases adjudicated by courts where modern codes had long prevailed.* Every such adjudication is to be taken as a tribute to the wisdom of the earlier jurists and judges, and a confession, perchance unwillingly made, that in the domain of law, innovation has been able to do little more than clear away redundant forms, that had served useful ends, but only remained a vail of verbiage, obscuring the merit of the substance to which they had become attached; while this substance, sound in its logic, just in its philosophy, forming as it were the base rock of the system of pleading, as crystalized in the immortal works of Saunders and Chitty, Stephens and Gould, survives, unquestioned and unquestionable, to continue in the future, as in the past, the aid and surety of justice, while civilization and science, hand in hand, "MOVE ON."

C. C.

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

NICHOLAS W. CASEY, RECEIVER, &c.,

vs.

COUNT GOFFREDO GALLI.

Original No. 15.

BRIEF FOR DEFENDANT.

This is an action at law, brought to enforce the individual liability of the defendant as a stockholder of the New Orleans National Banking Association. In form it is an action of debt.

By agreement, and in order to present for the consideration of the court several of the grounds of defence, the defendant has filed a demurrer to the declaration and also pleas in abatement without any waiver of the objection taken in either, and subject to the future order of the court in disposing of them. The plaintiff has joined in demurrer to the declaration, and has demurred to the pleas in abatement, and the defendant has joined in demurrer.

The questions thus presented are, by defendant's demurrer:

(1.) Whether the proceeding to enforce the liability of the defendant should not be in equity and not at law.

(2.) Whether to sustain the action at law it is sufficient to aver the necessity of enforcing the liability, and that such necessity has been determined by the comptroller of the currency without stating facts from which the court can determine the necessity.

(3.) Whether the determination by the comptroller that it is necessary to collect from each stockholder the entire amount for which he is liable, is conclusive upon the defendant without the allegation of any facts showing the amount which he is liable to contribute.

The questions raised by the plea in abatement are:

(4.) Whether majority of the directors, with the authority of the owners of two-thirds of the stock of a State bank, can change its organization into that of a national banking association without any authority given by the State law in its charter or otherwise to make the change.

(5.) Whether the certificate of the comptroller is conclusive as to the organization and existence of the association.

The remedy of the plaintiff is in equity.

I.

(1.) The shareholders are individually responsible for the debts of the association "equally and ratably"; that is to say, in an equal ratio, and in proportion to the stock by them respectively held.

Rev. St., sec. 5151.

This liability can be enforced only by the receiver.

And he can enforce it only "if necessary to pay the debts of such association.

Rev. St. sec. 5234.

It necessarily follows that "shareholders [of national banks] are only conditionally liable for those debts after all the ordinary resources of the bank have been exhausted."

Bank *vs.* Kennedy, 17 Wall., 19, 22.

It is to be observed that the case presented by the declaration is not a case where all the resources of the association have been exhausted and nothing remains but to collect the residue of liabilities from the stockholders. That would present a case where no account need be taken and where the remedy at law would be appropriate and applicable. The declaration does not aver that the resources are exhausted; but, on the contrary, shows that they are not; for it avers that the association owes money and that *its assets and credits are* wholly insufficient to pay the debts. The contingency, then, upon which the shareholder is to be called upon has not occurred.

No action *at law* ought to be sustained against the shareholders until the resources of the bank have been exhausted. Such is the intent of the act which gives the receiver power to collect debts, compromise claims, and sell all property and uncollectable claims, (R. S., sec.5234,) and after having given him this authority, adds that he "may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders."

The proceedings of the receiver should be in the order indicated. There cannot be said to be any *necessity* to enforce the individual liability until the receiver shall have, we do not say done, but at least attempted to do, what the act requires.

See Banks *vs.* Kennedy, *supra.*

We would not construe, in their strictest sense, the words of the court in Bank *vs.* Kennedy, and insist that the assets must be actually exhausted in the sense of being paid away, but the resources are exhausted when the receiver cannot derive money from them, *i. e.*, if they are contested and he can neither collect debts due the association nor sell them—if he has to sue—then it may fairly be said that he has exhausted the power given him by section 5234, and the necessity spoken of in that section has arisen to call on the shareholders.

Such was the decision of the Court of Appeals of New York in the case of the Reciprocity Bank, 22 New York, 18, where it was held that the receiver could not enforce the individual liability until he had realized from the assets all that he could, without resorting to the aid of the courts by suit.

In Hornor *vs.* Henning, No. 87, of this term, this court said, speaking of the act under which savings banks are incorporated in this district, "Taking the terms of the statute literally, the trustees are liable to the creditors as a body in the full sense of the excess, *without regard to the amount due collectively or individually*, and though the corporation may be willing and able to pay every debt it owes as it falls due or is demanded. * * * Nor does it matter whether the debts are in excess at the time the suit is brought or not. * * * But it is not readily to be believed that Congress intended to make the trustees liable beyond the debts of the bank which it failed or refused to pay."

Then, in the case presented by the declaration, the elements of the individual liability of the shareholder are—

First. The necessity of this contribution to pay the debts, involving (1) the amount of debt, and (2) the amount of the resources of the association, the difference being the deficiency to be made up.

Second. The amount he has to pay, involving: (1) the deficiency to be made up; (2) the amount of stock held by all the shareholders; (3) the amount of stock held by each one.

All these particulars enter into the determination of of the sum any one shareholder is to pay. The determination of these is appropriate to a court of equity, the remedy at law being imperfect and incomplete.

In Pollard *vs.* Bailey, 20 Wall., 520, an action at law was brought in the District Court of the United States for the middle district of Alabama to enforce the personal liability of Pollard under an act of the legislature of Alabama, providing that "individual stockholders having shares in said bank shall be bound respectively for all the debts of the bank in proportion to their stock therein." The defendant demurred to the declaration; the court overruled the demurrer, and by writ of error the cause was brought to this court, and the sole question was whether the remedy was in equity only. The defendant took the ground that the right to go into equity must be at the election of the creditor, and urged that the difficulty of the stockholder's protecting himself beyond the statute liability had never been suggested as a ground for proceeding in equity. The opinion thoroughly disposes of the objection thus:

This court said—

"Each stockholder is bound for the debts in proportion to his stock. His liability *is not limited to the par value of his stock*, neither is he bound absolutely for the payment of the full amount of that. He must pay a sum which shall bear the same proportion to the whole indebtedness that his stock bears to the whole capital and is not required to pay more. For the purposes of this case it is not necessary to decide what effect the insolvency of any of the stockholders would have upon the liability of such as are solvent. It is certain that no stockholder is liable for more than his proportion of the debts. This proportion can only be ascertained upon an account of the debts and stock and a pro rata distribution of the indebtedness among the several stockholders. The proper action therefore to enforce the liability is one in which such an account can be stated and distribution made. Such an action calls specially for the exercise of the powers of a court of equity, which can bring before it all the necessary persons and adjust all their rights. Every stockholder when called upon to perform his obligations has the right to require that the extent thereof shall then be determined, once for all, as well that which he is under *to his associate* *stockholders* as that to the creditors. Otherwise he might be made to respond to the creditors under one rule and obtain his relief *from the other stockholders* under another. The provision, therefore, for a proportionate liability is equivalent to a provision for an appropriate form of equitable action to enforce it. The case is different from what it would be if the charter had provided generally that all stockholders should be individually liable for the payment of the debts."

Per Ch. J. Waite in Pollard *vs.* Bailey, 20 Wallace, 524.

The only two points in which that case differs from this are italicised, and it will be seen that they are not such as to distinguish it in principle, that principle being that "*the provision for a proportionate liability is equivalent to a provision for an appropriate form of equitable action to enforce it.*"

So in Hornor *vs.* Henning *et al.*, this court said:

"The powers and instrumentalities of that court enable it to ascertain the excess of the indebtedness over the capital stock, the amount of this which each trustee may have assented to and the extent to which the funds of the corporation may be resorted to for the payment of the debts; also the number and names of the creditors, the amount of the said debts; to determine the sum to be received of the trustees and apportioned among the creditors, in a manner which the trial by jury and the rigid rules of common law proceedings render impossible."

It has repeatedly been adjudged that the fact of their being many claimants against a common fund is ground for excluding jurisdiction at law. The same reasoning applies when there are many persons liable to contribute ratably to a common fund. In the one case the credits are to be apportioned, in the other liabilities are to be apportioned ; but in both, the process of apportionment is precisely the same.

Kennedy *vs.* Gibson, 8 Wallace 498, was the case of a bill filed by the receiver against shareholders, to compel them to contribute to pay the debts of a banking association, stating that the assets were found to be insufficient, and that recourse would have to be had to the personal liability of the shareholders.

The court said :

"Where less is required, the proceeding may be in equity, and in such case an interlocutory decree may be taken for contribution, and the case may stand over for the further action of the court—if such action should subsequently prove to be necessary—until the full amount of the liability is exhausted. It would be attended with injurious consequences to forbid action against the stockholders until the precise amount necessary to be collected shall be formally ascertained. This would greatly protract the final settlement, and might be attended with large losses by insolvency and otherwise in the intervening time. The amount must depend, in part, upon the solvency of the debtors and the validity of the claims. Time will be consumed in the application of these, and the results in many cases cannot be foreseen.

"The same remarks apply to the enforced collections from the stockholders. A speedy adjustment is necessary to the efficiency and reliability of the law. The interests of the creditors require it, and it was the obvious policy and purpose of Congress to give it. If too much be collected, it is provided by the statute that any surplus which may remain, after satisfying all demands against the association, shall be paid over to the stockholders. It is better they should pay more than may prove to be needed than that the ends of delay should be encountered. When contribution only is sought, all the stockholders who can be reached by the process of the court may be joined in the suit.

"It is no objection that there are others beyond the jurisdiction of the court who cannot for that reason be made co-defendants."

This case will be relied on by the plaintiff, and in fact this action is manifestly founded upon the opinion in that case, and, as we say, upon a mistaken view of it.

That case is not against us .on this branch of the demurrer.

1. We contend here that the receiver should proceed in equity, just as in the case of Kennedy *vs.* Gibson the receiver did proceed in equity.

2. We say that an account should be taken of the debts, assets and stock held, and that the proper decree on such accounting would be for the contribution due on the shares which the defendants might own. And such was the prayer of bill in Kennedy *vs.* Gibson.

3. That case was decided upon demurrer, and the ground of demurrer was that the comptroller of the currency had not authorized the suit. This demurrer was sustained, upon the ground that the bill "contained no averment of any action by the comptroller touching the personal liability of the stockholders," and such averment was necessary.

The court held that when there were undistributed assets the receiver might proceed in equity; that an interlocutory decree might be taken for contribution; that it was not necessary to wait until the precise amount necessary to be collected shall be ascertained. The amount must depend in part upon the solvency of the debtors and the validity of the claims; and if the contributions of the shareholders are in excess of the liabilities, the excess can be returned.

Now it is true that these remarks are all applied to the case where less than the full amount of the stockholders' liability is required, but they are made in a case where the full amount was stated to be required. And the reason adopted by the court, in the opinion, in showing the necessity of the resort to equity is not the amount of the contribution required, but the fact that the assets are uncollected, and consequently the amount uncertain. Whether the amount were less or more that uncertainty would be the same. If the contributions required reach 99 cents on the dollar, the receiver says he is referred to equity, but if they reach 100 the receiver says he must proceed at law, while in both cases the need of contributions is precisely the same, viz., on account of the condition of the assets the shareholders must make advances.

If the assets have all been turned into money and distributed, and a small contribution only is needed from the shareholders, why go into equity? And, on the other hand, if the assets are such as cannot readily be realized, and it cannot be foreseen what amount will ultimately be required from the shareholder why is it a reason for proceeding *at law* that the comptroller estimates that the whole will be required.

In such a proceeding in equity, there can be no objec tion to the comptroller deciding conclusively what contributions shall be demanded, nor is any wrong done by his so determining, for they are not final; "an *interlocuotry* decree may be taken for contribution," says the court, and the surplus will be distributed.

Now a distribution of the surplus might be made after an interlocutory decree and while the case was *sub judice*, but no distribution could ever be made after a recovery at law or by final decree in equity. The comptroller is authorized to distribute only the surplus "of the assets of such association," and this he must distribute not among those who have contributed, but among the shareholders "in proportion to the stock held by them." R. S., sec. 5236.

Moneys received from shareholders are not assets of the association.

Dutcher *vs.* The Bank, *infra.*

No distribution made under this section,) and it is the only authority given him to distribute at all, (could return to shareholders anything by them paid under judgment or final decree. The only reimbursement made to shareholders must be of contributions made by them under *interlocutory* decrees and returned to them under subsequent order of the court for reasons just shown.

If the amount to be paid must, as the court says, depend in part upon the solvency of the debtors and the validity of the claims of creditors of the association, and it would be attended with injurious consequences to forbid action until the precise amount necessary to be collected shall be ascertained, how can the determination of the comptroller, before the assets are disposed of, be *conclusive* as to the amount to be paid? Certainly the court, however particular expressions may read, meant distinctly to say that the amount to be paid as a final payment—paid under judgment or final decree—could not be determined in advance of the realization of the assests. We respect the words of the court:

" The amount *must* depend in part upon the solvency of the debtors, and the validity of the claims. Time *will* be consumed in the application of these tests, and the result in many cases cannot be foreseen." And yet, seizing upon a single expression isolated from the reasoning in which it is founded, the plaintiff insists that the comptroller shall deliver in advance that which the court says *cannot be foreseen,* and his determination shall be carried into final judgment by this court without any inquiry whatever as to its correctness, and, as we confidently assert, without the possibility of returning the money exacted, if he exact too much.

Certainly an action at law may be maintained by the receiver, but only when the assets have been actually exhausted; when all uncertainty has been removed by the "application of those tests" referred to by the court, and when no further account can be or need be taken.

To recapitulate: The language of the court in Kennedy *vs.* Gibson, as construed by the plaintiff, is that when he seeks to recover to the extent of the liability he must proceed at law, and where he seeks to recover less he must proceed in equity.

We say the true meaning of the court is that when the receiver does not wait for the final collection of the assets he must proceed in equity. When the assets have been exhausted, he may or must proceed at law. All the reasoning of the court leads to this conclusion, and in no wise supports the view of the plaintiff.

II.

There is another feature in the act which renders a re sort to equity proper, if not necessary.

The statute R. S., sec. 5202, recognises two different classes of debts which the association may contract; 1st, the four kinds specified in the section, viz., circulation, deposits, drafts, and dividends; and, 2d, all other kinds. These last are charges against the capital stock only. The others are charges against the assets generally. It is clear that the shareholders are not liable for these debts which are charges only against the capital stock, and they are entitled to see that the general assets are not used to pay such debts and thus increase the balance of legitimate indebtedness for which the shareholders are bound.

III.

Recent legislation has given the sanction of law exclusively to the remedy of equity. By the organic act, when an association goes into voluntary liquidation, no receiver is appointed, and no person was designated by law to enforce the personal liability of stockholders. To supply this defect, if it was one, Congress, by the act of June 30, 1876, chapter —, has enacted that in such case "the individual liability of the shareholders, provided for by section 5151 of said statutes, may be enforced by any creditor of such association;" and how? "By bill in equity in the nature of a creditor's bill, in behalf of himself and all other creditors of the association, against the shareholders thereof, in any court of the United States, having original jurisdiction in equity for the district in which such association may have been located or established."

In this act, the single creditor is for the purpose of enforcing the individual liability placed in the stead of the receiver, who, by virtue of his office, represents all the creditors, and can bring his bill in equity in the proper court of the United States.

There can be no reason for confining the creditor to equity that does not equally apply to the receiver, and the fact that Congress has thought proper to do so, is at least a legislative indication of the preferable course to be pursued.

IV.

But the foregoing point would be immaterial, and a decision in favor of the defendant would be worthless if the inquiry then were limited to the facts which the plaintiff sets forth in his declaration, and upon proof of which he claims the right to recover.

The demurrer here is interposed solely because we think that in a suit in equity, the grounds on which the plaintiff proceeds, and the defences on which the defendant relies, can be more appropriately considered than in an action at law, or, in other words, that a wider range of inquiry would be opened than in an action at law.

All we seek is implied in the taking of an account of debts and liabilities in equity.

But if we are denied a resort to equity, can we not secure the same right in this action? If we have the *right*, the machinery of the common law, though stiff and unweildy, may still work out the result.

And here we may as well indicate the scope which we conceive should be given to the investigation in this case whether the remedy be at law or in equity; and after considering the liabilities and rights of the defendant we can better discuss the remaining grounds of the demurrer, the object of which is to compel the plaintiff to introduce into his declaration, if he truthfully can, averments of facts, which we contend are essential to support his action, but which he seeks to avoid submitting to the judgment of the court.

First. What then are the liabilities of the defendant, and what are the limits of those liabilities?

(1.) He is liable for all contracts, debts and engagements of the association. R. S., § 5151.

(2.) He is liable, not to the association, but to the creditors of the association. Dutcher *vs.* The Marine National Bank, 12 Blatchford, 435.

(3.) He is not liable for any obligation except those authorized by sec. 5202, R. S.

(4.) He has a right to dispute the existence of any debt sought to be enforced against him, and to have such controversy judicially determined.

(5.) He is not liable to be called upon to pay the debts of the association until its resources have been exhausted.

The first two propositions need no discussion.

In entering upon the consideration of the third proposition, it is well to bear in mind a rule of construction which rests upon high authority. In Gray *vs.* Coffin, 9 Cushing, 199, Shaw, C. J., said:

> "To create any individual liability of members for the debt of a corporation—a body politic created by law and regarded as a legal being, distinct from that of all the members comprising it, and capable of contracting and being contracted with as a person—is a wide departure from established rules of law founded in consideration of public policy and depending solely upon provisions of

positive law. It is therefore to be construed strictly, and not extended beyond the limits to which it is plainly carried by such provision of statute."

"By R. S., sec. 5202, it is provided that 'no association shall, at any time, be indebted or in any way liable to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by loss or otherwise, except on account of demands of the nature following: First, notes of circulation; second, moneys deposited with or collected by the association; third, bills of exchange, or drafts drawn against money actually on deposit to the credit of the association, or due thereto; fourth, liabilities to the shareholders of the association for dividends and reserve profits.'

For every demand not included in these four classes the creditor must look to the capital stock alone, and to the assets in which that stock has been invested. Whatever difficulties may arise in construing this section, and applying it to conditions of facts which might exist, the construction which only we find it necessary to contend for here is that creditors of the association, whose demands are founded upon transactions not included in the four enumerated classes, or who have entered into speculation with the association beyond the scope of its legitimate business, cannot enforce their demands against the shareholder. If the prohibition of the statute has any meaning whatever it applies to transactions thus characterized.

We might go further, and upon the authority of well-considered adjudged cases maintain that all such engagements contracted by parties who are ignorant of the violation of law would not be valid against either the association or the shareholders.*

In Root *vs.* Goddard, 3 McLean, 102, suit was brought on certain notes issued by the Bank of Saline and the Bank of Brest." These notes, it appears, had been issued in contravention of a certain act called the Safety Fund act, and it was insisted that they were void. The court said: "There can be no doubt that a contract entered into by a corporation that has no powers except those which are specially given to it, is void if made in violation of law. The notes in question are not made payable on demand but on time, and this being against the statute makes the notes void. Are the notes void in the hands of a *bona fide* holder without notice? If they were void *ab initio*, they must be held so in the hands of such a holder. Wiggin *vs.* Bush, 12 John, 310.

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*See note at end of this brief.

The fourth proposition asserts the right of a shareholder to deny the existence of any debt sought to be enforced against him. It appears almost too obvious for argument that if a creditor should sue a shareholder upon his statutory obligation to pay a debt of the association, he must aver the existence of the debt, and the averment would be material and traversable. The statute authorizes the receiver to enforce that liability without more. How does this change the liability of the defendant, or the proof necessary to sustain the action? Certainly the only effect of the statute is to put the receiver in the place of the creditor as a party to the action. He sues for the use of the creditor. The money recovered is not assets of the association. Dutcher *vs.* The Bank, *supra.*

The fifth proposition, as to the time when this liability is to be enforced, has been stated and supported in a previous part of this argument.

V.

Now, to the contrary of all this, it will be, for it must be, to support his declaration, maintained by the plaintiff that none of these questions are open in the case. In short, he must contend that the defendant is bound to pay whatever sum the comptroller thinks proper to demand to the extent of the par value of his stock; and as when the money is once recovered, the comptroller is not responsible to any one but for the creditors for whose use it was recovered, the monstrous consequence necessarily follows that the defendant is deprived of his money without any proof of the existence of the obligation which the statute renders him liable to discharge.

It may be said that the comptroller determines the existence of the debt before he calls upon the shareholder; but the existence of the debt is a controversy between the creditor and the shareholder—between private persons. No authority is given to him by the statute to determine such a controversy. Such authority would be judicial power which Congress cannot, if it would, confer upon an executive officer. Granting that Congress intended to give the comptroller such power, and that he had exercised such power, and had deliberately decided that the defendant owed the creditor so much money, it would not be conclusive in any court of justice, but is a mere ministerial act. *Ex parte* Randolph, 2 Brock., 448.

In *ex parte* Randolph, Ch. J. Marshall, after stating the duty imposed on the Treasury officers to settle the accounts of public officers and agents, and to issue warrants of distrain against delinquents, said: "If this ascertainment of the sum due the Government, and this issuing of process to levy the sum so ascertained to be due, be the exercise of any part of the judicial power of the United States, the law which directs it is plainly a violation of the first section of the third article of the Constitution, which declares that " the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as Congress shall from time to time ordain and establish. The judges both of the supreme and inferior courts shall hold their offices during good behavior." The judicial power extends to "controversies to which the United states shall be a party."

"The persons who are directed by the act of Congress to ascertain the debt due from a delinquent receiver of public money, and to issue process to compel the payment of that debt, do not compose a court ordained and established by Congress, nor do they hold offices during good behavior. Their offices are held at the pleasure of the President of the United States. They are consequently incapable of exercising any portion of the judicial power, and the act which attempts to confer it is absolutely void."

And speaking of the same act in Murray's Lessee *vs.* Hoboken Land & Improvement Company, 18 How., 272, Mr. Justice Curtis, delivering the unanimous opinion of the court, said: "It must be admitted that if the auditing of this account and the ascertainment of its balance, and the issuing of this process was an exercise of the judicial process of the United States, the proceeding was void, for the officers who performed these acts could exercise no part of that judicial power. They neither constituted a court of the United States, nor were they, or either of them, so connected with any such court as to perform even any of the ministerial duties which arise out of judicial proceedings."

And he proceeded to sustain the validity of the act upon the ground that in all time past, in England, there had been, "by the law of the land, a summary method for the recovery of debts due to the crown, and especially those from receivers of the revenues." It was not suggested by any one that Congress had any power to authorize the Treasury officers to determine the amount due the officer to the United States, other than the power conferred on Congress to deal with its own officers and agents by that clause of the Constitution which gives authority to levy and collect taxes, duties, imports and excises; and after a most elaborate opinion affirming the right on the grounds stated, the court qualified and guarded the doctrine by these weighty words.

"To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or in admiralty, nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination." P. 284.

In what clause of the Constitution does the plaintiff find the power to declare that the comptroller of the currency shall determine how much is due from this defendant to the creditors of the New Orleans National Banking Association? And when he has pointed out that clause we will ask him to show that clause of the statute by which Congress has conferred such authority on the comptroller·

VI.

The declaration does not aver a proper cause of action.

In pleading it is essential that the plaintiff shall aver in his declaration such facts, which, if true, would entitle him to recover from the defendaat the amount he claims. It is not enough to show simply that something is due and then claim a definite amount, but the averments must show how much is due. This is more strictly the rule in actions of debt when the judgment by default is final. In debt for rent he must show how much is due and how the amount is made up. In debt on award, how much was awarded. In debt on bond conditioned for the payment of money, how much is in arrear.

2 Chitty Pl., 38 *et seq.*

Now, there is no averment in this declaration that any amount is due, but the averments intended to supply the place of that required by the rules of pleading, and that the debts of the association exceed the assets; that it is necessary to express the personal liability of the shareholders, and that the comptroller has directed the plaintiff to enforce the personal liability of the defendant to the full amount of the par value of his stock. Does that bring the defendant within the terms of the statute? The allegations may all be perfectly true, and yet the shareholders may not be justly liable for more than one dollar tnstead of $6,000,000, of which this defendant is required to pay his proportion. Nay, the allegations may all be true, and yet the shareholders may not be liable for anything, for the excess of debts unpaid may consist of demands not specified in sec. 5202, and so may be debts for which the shareholders are not liable. They may consist of debts contracted to purchase and furnish a banking house; for rent, legal expenses, &c., &c.; or they may consist of debts for borrowed money under section 5200, or for certified checks under section 5208, or money lost; such speculations as moneyed corporations often are seduced into; all which are demands against the capital stock only, but not against the general assets of the association or the shareholders.

In Story *vs.* Freeman, 25 New York, 214, the proceedings at law under the New York act to enforce the individual liability of a shareholder are detailed. The receiver appointed by the court was directed by the court "to commence an action against the stockholders to compel a contribution from them sufficient to satisfy the debts after applying such assets, not exceeding the amount of stock held by such stockholders respectively." The plaintiff proved the debts of the corporation to amount to $145,699.29, and the assets to amount to $44,457, and the sum of $47,909.95 voluntarily contributed by shareholders, and the balance due creditors to be $69,000. He proved also the amount of the defendant's stock, and the referee made the apportionment.

There was no pretence in that case that the court which appointed the receiver could determine and apportion the amount to be paid by the shareholders, although that was a court of equity and the money would be distributed there. The apportionment was left to be fixed by the court in which, and in a proceeding to which, the shareholder was a party, and in which he could have his liability and the extent of it judicially determined. So in Ogilvie *vs.* Knox Ins. Co., 22 How., 380.

If it be not necessary in the declaration to show the nature of the debts which are averred to exceed the liability as we think should be done, it is at least necessary to show the amount of those debts in order that the defendant may show if he can that debts such as he is not liable for go to make up the amount.

If there may be, as we contend, debts of the association which are limited for their payment to the capital stock, then the declaration ought to show that the claim therein made is confined to those for which he is liable, or give opportunity for the defendant to show it.

VII.

Another ground of demurrer is that the plaintiff claims more than the declaration shows to be due.

We submit that *no judgment can be rendered* exceeding the amount at par value of defendant's stock.

VIII.

The defendant pleads in abatement that there is no such corporation as the New Orleans National Banking Company.

Is this plea good? Does it attack the existence of the corporation collaterally? We say not.

The plaintiff brings this action in his official character as receiver of the bank, and as such, an officer of the United States. In no other capacity can he sue. The fact of his appointment is not traversable. The only question is that there is no such office. If there be such a corporation he has the right to sue; if there be not he has not that right.

The declaration alleges that the association of which the plaintiff is receiver was organized under the act of Congress by the conversion of an association chartered under the laws of Louisiana into a national banking association by due and regular proceedings; that is, by a majority of the directors of said bank executing articles of association specifying the object of the association, and other provisions, and by their executing also an organization certificate.

The plea avers that the act of the directors was not authorized by the charter of the bank, or by any law of Louisiana, and was therefore wholly void. And a second plea avers that two-thirds of the stockholders did not authorize the change.

On this subject the authorities are not few or doubtful. Mr. Ashbel Green, in his notes to Brice on Ultra Vires, speaking of consolidations of corporations, says, p. 539:

> "A charter being a contract gives to a certain corporation all the powers which it can exercise. Any alteration which the corporation desires to make, then, must in the first place have the sanction of the legislature. * * * Almost all the cases cited in this note will be found to uphold the necessity of legislative authority in order to the consolidation of corporations. * * * The first essential authority from the legislature having been obtained, the rights of the individual stockholders are next to be considered. * * * The legislature cannot authorize a majority of the corporation to make any change against the will of the minority, for such an act would impair the obligation of a contract."

The subject is discussed at great length in the note referred to and numerous authorities cited. Most of them, however, relate to the rights of the individual stockholders after said attempted changes. The question whether any change can be made even unanimously by the shareholders without the authority of the legislature is negatived and dismissed in a few sentences.

Some authorities are as follows:

"It is a general rule that a corporation can only act in the manner prescribed by law. * * * Without ascribing to this body, which in its corporate capacity is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it, *to derive all its powers from that act and to be capable of exerting its faculties only in the manner which that act authorizes.*

"*To this source of its being then we must recur to ascertain its powers and to determine whether it can complete a contract by such communications as are in this record.* * * * He who authorizes another to make a writing for him makes it himself; but with these bodies which have only a legal existence it is otherwise. *The act of incorporation is to them an enabling act—it gives them* ALL THE POWER THEY POSSESS; it enables them to contract, and when it prescribes to them a mode of contracting they must preserve that mode or the instrument no more creates a contract than if the body never had been incorporated. Per Marshall, C. J., in Head and Amery *vs.* Peoria Insurance Co., 9 Cranch, 127, 166, 167, 169.

"From the nature of the stock of a corporation which is created by and under authority of a State, it is necessary, like every other attribute of the corporation, to be governed by the local law of that State, and not by the local law of any foreign State. And in the present case, if the local law of Louisiana had prohibited (as we think it did not) any assignment of an equitable interest in the stock attached, we should not have scrupled to have followed that law." Per Story, J., in Black *et al. vs.* Zacharia & Co., 3 How. 483, 511.

"An act is said to be *ultra vires* when it is not within the scope of the powers of the corporation to perform it under any circumstances or for any purpose. An act is also sometimes said to be *ultra vires* with reference to the rights of certain parties, &c., &c. * * * When the act is *ultra vires* in the first sense mentioned it is generally, if not always, void in toto, and the corporation may avail itself of the plea." Miners' Ditch Co. *vs.* Zellerbach, 37 Cal., 543, 579.

IX.

The contemporaneous construction given by several State legislatures to the act of Congress is in favor of the necessity of legislative action to authorize the conversion of State banks into national banks.

New York, in March, 1865, (Stat. vol. 6, p. 441); New Jersey; Pennsylvania, in August, 1864, (Acts of 1864, p. 977); Maryland, in 1865, (Acts of 1865, p. 144), passed general enabling acts authorizing the conversion of State banks and directing how the assent of the stockholders should be given. Massachusetts, Vermont, and Connecticut passed acts regulating the proceedings of these banks or organizations under the national law.

That such authority was necessary to the conversion was decided and maintained by the Supreme Court of Pennsylvania in the Manufacturers and Mechanics' Bank of Philadelphia, in Commonwealth, 72 Penn. State Rep., 70. That bank voted to become a national bank, and received a certificate of organization from the comptroller of the currency, *it seems*, November 1, 1864, but did not comply with the terms of the enabling act in regard to the surrender of its charter until December 19, 1864. The enabling act required taxes to be paid up to the date of becoming a national bank. The commonwealth claimed taxes to the latter date. The bank paid up to November 1, and refused to pay to a later date. Upon these facts agreed, the case was submitted upon stipulation "that if the court shall be of opinion that the said M. and M. bank is not liable to pay any tax upon dividends after November 1, 1864, then payment shall be entered for the defendant." Judgment was entered for the commonwealth, and the bank appealed to the Supreme Court. That court said:

"Both these cases depend upon the question, what time did the bank, under the provisions of the enabling act of 22d May, 1866, (?) surrender its charter *and become a* banking association under the act of Congress of June 3, 1864."

The learned judge below held that to have been on the 19th December, 1864, when, on the certificate of the auditor general that all taxes due on the 1st of the pending November had been paid, the governor caused notice, as required by law, to be published that the bank had become a national institution.

The 10th section of the enabling act required the bank to pay all taxes imposed upon it by State laws to the date of its becoming a national bank.

"We think the enabling act was necessary—a binding legislation on these State banks—and that the taxes due until the surrender was forfeited according to its terms, were due to and collectable by the State. This was the opinion of the learned court below, and with it we agree. Judgment affirmed."

X.

It cannot be said that the act of the directors in this case, though void as the act of the corporation, was valid as the act of private persons. The act of Congress purported to anything—any bank incorporated by special law, or any banking institution organized under a general law of any State [to] become a national association," and the acts done by the directors of the State bank in this case were done in pursuance of this authority. They acted officially and not personally, and could not, if they would, set up an authority given by one statute for one object to validate an act done and expressed, and intended to be done under a provision of law applicable to another and different object. They cannot say, nor can anyone, that whereas they intended to change the State bank into a national bank, they have done no such thing, but have organized a new national bank.

In this case we meet with none of the difficulties and hardships that attend the repudiation of contracts made by private persons with corporations acting *ultra vires*. Here the State institution remains in being, and no doubt any just demand could be enforced against it.

"By accepting a new charter granting new rights or giving a new name of incorporation without a surrendering of their old charter, the corporation will not lose any of their former franchises." B. N. P., 213, citing 4 Co., 87, Ventris, 350.

"A new charter was granted in consideration of the surrender of the old one; the old one was, in fact, surrendered, but the surrender was not enrolled, wherefore the new one was void; but the members under both charters being the same, what they did, being warranted by the old charter, was holden good." B. N. P., 213, citing Ca. K. B., 247, 253.

For many purposes the State banks were continued in being for various periods after the formation of the national association. But even were it otherwise the rule of law is imperative that acts of corporations done without legislative authority are utterly void, and if any person in reliance upon such void acts has parted with his property he must have recourse to the persons who individually have had it. Brice's Ultra Vires, Part IV, Chap. 3, Green Ed., p. 608. A different rule may prevail in some cases where the act was within the scope of the powers of the corporation, but was not formally authorized; but as to acts which the corporation had not the power to do the rule is as stated.

Conclusion.

We submit that the plaintiff cannot recover in this action.

J. M. CARLISLE,
J. D. McPHERSON,
Attorneys for Defendant.

Note.

It was the intention of the counsel on both sides to present to the court, by proper pleadings, in advance, all the questions that will arise in the progress of the trial, and to that end a stipulation was entered into and filed that all demurrers and pleas might be put in without regard to their order, and without waiver of any objections, subject to the direction of the court as the disposition to be made of them. It was, however, found impossible to obtain the full information necessary to draft the pleas in bar until too late to prepare for the hearing.

The pleas in bar will be so framed as to offer defences, founded on the following facts :

(1.) That the debts proved before the comptroller amount to........................	$11,833 23
(2.) That an instalment of 15 per cent. has been paid.........	121,774 98
(3.) Leaving due.....................	$690,058 25
(4. That the assets on hand applicable to the payment of this balance nominally amount to..........................	$717,563 58
(5). That their actual value, estimated by the comptroller of the currency, excluding $28,000 "doubtful", and, in fact, exceeds.......	$285,000

(6). That large amounts of the assets of the bank are deposited as collaterals, and not included in the assets on hand

(7). That there are no debts of the bank not proved before the comptroller, except those amply secured by collaterals.

(8). That a large amount of the indebtedness of the bank, in excess of the amount of the capital stock undiminished, consists in unpaid bills and drafts drawn on long time (sixty and ninety days), not upon moneys on deposit to the credit of the association or due thereto, but upon persons who neither had money to the credit of the association nor were indebted to it. That those were issued, not upon lawful or valuable considerations, but same as banks on borrowing money in excess of the amount authorized by law; and others were loans of the credit of the association, and the takers and holders of said drafts had notice and knowledge of the facts. That also a demand against the bank to the amount of $218,000 was incurred in a speculation entirely beyond the scope of the business of the bank, and the persons holding such demand had full notice and knowledge thereto.

J. M. CARLISLE.
J. D. McPHERSON.
Attorneys for Defendant.

1 Plea overruled

1 Ditto 29

[illegible] 2 56

72 Penn St

15 Original

23*a* And now, to wit, the 15th day of March, 1877, the following entry appears of record:

Supreme Court of the United States, October term, 1876.

NICHOLAS W. CASEY, RECEIVER, &C., PLAINTIFF, *vs.* COUNT GOFFREDI GALLI. } 15. Orig'l.

The argument of the demurrers & pleas in abatement in this cause was commenced by Mr. C. Case, of counsel for the plaintiff, continued by Mr. J. D. McPherson, of counsel for the defendant. The court declined to hear further argument.

23*b* And now, to wit, the 26 day of March, 1877, the following entry appears of record:

Supreme Court of the United States, October term, 1876.

NICHOLAS W. CASEY, RECEIVER, &C., PLAINTIFF, *vs.* COUNT GOFFREDI GALLI. } 15. Orig'l.

This cause came on to be heard on the demurrer and pleas in abatement, and on the plaintiff's demurrer to the defendant's pleas, and was argued by counsel. On consideration whereof it is now here ordered by the court that the plaintiff's demurrer be, and the same is hereby, sustained.

23 And now, to wit, the 26th day of March, the following entry appears of record:

Supreme Court of the United States, October term, 1876.

NICHOLAS W. CASEY, RECEIVER, &C., PLAINTIFF, *vs.* COUNT GOFFREDI GALLI. } 15. Orig'l.

On motion of Mr. J. D. McPherson, of counsel, leave is hereby granted the defendant to plead over in fourteen days in this cause.

24 *Motion for leave to plead over.*

In the Supreme Court of the United States, Octo. term, 1876.

N. W. CASEY, RECEIVER, *vs.* COUNT GOFFREDO GALLI. } Original. No. 15.

And now comes the defendant, and moves the court for leave to plead over within 14 days.

CARLISLE & McPHERSON,
Attys. for Deft.

Filed 26 March, 1877.
REC. 15—2

May 2 1877
McGuire

25 *First plea in bar.*

In the Supreme Court of the United States, October term, 1876.

NICHOLAS W. CASEY, RECEIVER OF THE National Banking Association of New Orleans,
vs.
COUNT GOFFREDO GALLI.
Original. No. 15.

And now comes the said defendant, Goffredo Galli, and says that he does not owe the said sums of money above by the plaintiff demanded, or any part thereof, in manner and form as the said plaintiff, Nicholas W. Casey, hath complained against him; and of this he the said plaintiff, Goffredo Galli, puts himself upon the country.

J. M. CARLISLE,
JNO. D. McPHERSON,
Attorneys for Defendant.

Filed 9th April, 1877.

26 *Second plea in bar.*

In the Supreme Court of the United States, October term, 1876.

NICHOLAS W. CASEY, RECEIVER OF THE National Banking Association of New Orleans,
vs.
COUNT GOFFREDO GALLI.
Original. No. 15.

And now comes the said Goffredo Galli, and for a further plea, by leave of the court, says:

That he ought not to be charged with the said debt by virtue of the said act of Congress, and the said determination and decision of the Comptroller of the Currency set forth in the declaration, because he says that some of the shareholders of the said banking association are insolvent, and the said Comptroller of the Currency in making the said determination and decision, and as part of said determination and decision, determined and decided to exact from this defendant, and from a number of shareholders of said National Banking Association less than the whole, such sums of money as would suffice to pay all the debts and liabilities of the said National Banking Association, with the intent and
27 purpose to compel this defendant and others of said shareholders
who may be solvent to contribute the entire sum necessary to pay the debts and liabilities of the said National Banking Association, without any contribution from those who are insolvent.

And this he is ready to verify.

J. M. CARLISLE,
JNO. D. McPHERSON,
Attorneys for Defendant.

Filed 9th April, 1877.

28 *Third plea in bar.*

In the Supreme Court of the United States, October term, 1876.

NICHOLAS W. CASEY, RECEIVER OF THE National Banking Association of New Orleans,
vs.
COUNT GOFFREDO GALLI.
Original. No. 15.

And now comes the said Goffredo Galli, and for a further plea, by leave of the court, says that he ought not to be charged with the said debt by virtue of the said act of Congress, and the said determination and decision of the Comptroller of the Currency in the declaration set forth, because he says that one of the debts and liabilities of the said National Banking Association, to pay and discharge which the said Comptroller of the Currency has determined and decided it is necessary to enforce the individual liability of the shareholders of the said National Banking Association to the full amount thereof, and the said plaintiff, in pursuance of said determination and decision, has demanded of the defendant in the said declaration the full sum of fifteen hundred dollars, is a certain alleged debt or liability of two hundred and 29 twenty thousand dollars ($220,000) due from the said National Banking Association to the Société de Crédit Mobilier of Paris, for moneys paid by the said Société de Crédit Mobilier, in payment of drafts drawn by the said National Banking Association upon the said Société de Cródit Mobilier; and neither at the time of drawing the said drafts nor afterwards at any time had the said National Banking Association any money on deposit to its credit with the said Société de Crédit Mobilier, nor did the said Société de Crédit Mobilier owe any money to the said National Banking Association. And the said National Banking Association, at the time of drawing said drafts, and the said Société de Crédit Mobilier, at the time of accepting and paying the same, knew that the said National Banking Association had no money on deposit to its credit with the said Société de Crédit Mobilier, and that there was no money due from the said Société de Crédit Mobilier to the said National Banking Association. And another of the said debts and liabilities is a certain alleged debt or liability of one hundred thousand dollars ($100,000) due from the said National Banking Associa- 30 tion of New Orleans to C. J. Hambro & Son of London, for moneys paid by the said C. J. Hambro & Son in payment of drafts drawn upon them by the said National Banking Association of New Orleans, and neither at the time of drawing the said drafts nor at any time afterward had the said National Banking Association any money on deposit to its credit with the said C. J. Hambro & Son, nor was any money due from the said C. J. Hambro & Son to the said National Banking Association. And the said National Banking Association, at the time of drawing the said draft, and the said C. J. Hambro & Son, at the time of accepting and paying the same, well knew that the said National Banking Association had no money on deposit to its credit with the said C. J. Hambro & Son, and that there was no money due from the said C. J. Hambro & Son to the said National Banking Association.

And another of said debts and liabilities is the liability of the said National Banking Association of New Orleans as drawer of a certain bill of exchange, dated August 30, 1873, for two hundred thousand francs, of the value of forty thousand dollars, ($40,000,) upon Seignouret Frères of Bordeaux, in favor of 31 C. Craroe & Son, which was not paid; and neither at the time of drawing the said bill of exchange, nor at any time afterwards, had the said National Banking Association any money on deposit to its credit with the said Signouret Frères, nor was any money due to the said National Banking Association from the said Signouret Frères. And the said National Banking Association, at the time of drawing the said bill of exchange, knew that there was no money on deposit to its credit with the said Signouret Frères, and no money due to it from them. And another of said debts and liabilities is the liability of the said National

Banking Association as drawer of a bill of exchange, dated September 9th, 1873, for one hundred and seventy-five thousand francs, of the value of thirty-five thousand dollars, ($35,000,) in favor of Sternburger, Netter and Seasongood upon Signouret Frères, of Bordeaux, which was not paid; and neither at the time of drawing of said bill of exchange, nor at any time afterwards, had the said National Banking Association any money on deposit to its credit with the said Signouret Frères, nor was any money due to it from them. And the said National Banking 32 Association knew at the time of drawing the said bill of exchange that there was no money on deposit to its credit with the said Signouret Frères, and no money due from it to them.

And another of the said debts & liabilities is the liability of the said National Banking Association as drawer of a certain bill of exchange, dated September 17th, 1873, for two hundred and fifty thousand francs of the value of fifty thousand dollars, ($50,000,) in favor of S. Shuckhart & Sons, upon Signouret Frères, of Bourdeaux, which was not paid; and neither at the time of drawing the said bill of exchange, nor at any time afterwards, had the said National Banking Association any money on deposit to its credit with the said Signouret Frères, nor was any money due to it from them. And the said National Banking Association, at the time of drawing the said bill of exchange, knew that there was no money on deposit to its credit with the said Signouret Frères, and no money due to it from them.

And another of the said debts and liabilities is the liability of 33 the said National Banking Association as endorser of a certain bill of exchange, dated July 5, 1873, drawn by C. Cararoe & Son upon G. Honorat & Co. of Marseilles for one hundred thousand francs, of the value of twenty thousand dollars, ($20,000,) which was not paid, and as endorser of five certain bills of exchange, drawn by the said C. Cararoe & Son upon Signouret Frères, of Bordeaux; one dated August 4, 1873, for one hundred and fifty thousand francs; one dated August 7, 1873, for two hundred thousand francs; one dated August 25, 1873, for one hundred thousand francs; one dated August 29, 1873, for two hundred and fifty thousand francs; and one dated September 7, 1873, for one hundred and fifty thousand francs, of which the acceptors paid thirty-five per cent., leaving due five hundred and fifty-two thousand francs, of the value of one hundred and ten thousand dollars.

And the defendant says that the assets of the said National Banking Association, in the hands of the said plaintiff, applicable to the payment of just debts and liabilities of the said association amount to not less than three hundred and forty-five thousand five hundred and 34 ninety dollars, and that the debts and liabilities of the said National Banking Association, including the debts and liabilities hereinbefore specified, do not exceed seven hundred and fifty-three thousand eight hundred and thirty-seven dollars; all of which he is ready to verify.

J. M. CARLISLE,
JNO. D. McPHERSON,
Attorneys for Defendant.

Filed 9th April, 1877.

35 In Supreme Court of the United States of the term of October, 1876.

NICHOLAS W. CASEY, RECEIVER OF THE NEW Orleans National Banking Association, plaintiff, *vs.* COUNT GOFFREDO GALLI, DEFENDANT.	Original No. 15. Debt.

Similiter to 1st plea in bar.

And the said plaintiff, by Rouse & Grant, & Charles Case, his attorneys, now comes, and as to the plea of the said defendant by him first above pleaded in bar, and whereof he hath put himself upon the country, doth the like.

Special demurrer to 2nd plea in bar.

And the said plaintiff, as to the said plea of the said defendant by him secondly above pleaded in bar, saith the same and the matters therein contained, in manner and form as the same are above pleaded and set forth, are insufficient in law to bar or preclude him, the said plaintiff, from having or maintaining his action aforesaid thereof against said defendant, and that he, the said plaintiff, is not bound by law to
36 answer the same; and this the said plaintiff is ready to verify.

Whereof, by reason of the insufficiency of said plea in this behalf, the said plaintiff prays judgment and his debt aforesaid, together with his damages by him sustained on occasion of the detention thereof to be adjudged to him.

And the said plaintiff, according to the form of the statute in such case made and provided, states and shows to the court here the following causes of demurrer to the said second plea, that is to say:

First. Said plea is in substance only the general issue specially pleaded, in that it seeks specially to controvert the plaintiff's right to sue by reason of an alleged failure of the Comptroller of the Currency to order collection from and against all the shareholders of said bank, which same defence could be set up and maintained under the said plea of nil debet first above pleaded.

Secondly. Said second plea is argumentative, in this, that it is
37 only a matter of inference from said plea that said Comptroller has failed to order collection against all of said shareholders; and further, in this, that it is not positively averred that any shareholders of said bank is or was at any time insolvent but such insolvency, if it appears at all by said plea, only appears as an assumed fact or by inference only.

Thirdly. Said second plea is indefinate and not sufficiently certain to require plaintiff to answer the same.

General demurrer to 3rd plea in bar.

And said plaintiff, as to the said plea of said defendant by him thirdly above pleaded in bar, and the matters therein contained, in manner and form as the same are above pleaded, saith that the same are insufficient in law to bar or preclude him, the said plaintiff, from having and maintaining his aforesaid action thereof against said defendant, and that he, said plaintiff, is not bound by law to answer the same; whereof, by reason of the insufficiency of the said third plea in this behalf, said plaintiff prays judgment and his debt aforesaid, together with his damages by him sustained on occasion of the detention thereof to be 38 adjudged to him.

ROUSE & GRANT &
CHAS. CASE,
Of Counsel and Attorneys for Plaintiff.

Filed 10th April, 1877.

39 *Joinder in demurrer to pleas in bar.*

In the Supreme Court of the United States, October term, 1876.

NICHOLAS W. CASEY, RECEIVER, &C.,
vs.
COUNT GOFFREDO GALLI.
} Original, No. 15.

And the defendant saith that said second and third pleas of the said defendant, and each of them, and the matters contained therein and in each of them, are sufficient in law to bar the action of the said plaintiff, which said pleas and the matter contained therein the said defendant is ready to verify and prove as the court shall direct. Wherefore, inasmuch as the said plaintiff hath not denied nor in any manner answered the said pleas, the defendant prays judgment that the plaintiff be barred from having and maintaining his said action.

J. M. CARLISLE,
J. D. McPHERSON,
Attorneys for Defendant.

Filed 17th April, 1877.

ole

40 *Stipulation waiving jury.*

In the Supreme Court United States.

NICHOLAS W. CASEY, RECEIVER OF THE NEW Orleans National Banking Association, plaintiff, *vs.* COUNT GOFFREDO GALLI.	In debt. Original action No. 15.

In the above-entitled cause the parties thereto hereby waive a trial by jury and submit the same for trial on the facts to the court.

ROUSE & GRANT & CHARLES CASE,
Of Counsel & Attys. of Plaintiff.
CARLISLE & McPHERSON,
Attorneys for Defendant.

WASHINGTON, D. C., *April 23d*, 1877.
Filed 23rd-April, 1877.

41 *Organization certificate.*

TREASURY DEPARTMENT,
OFFICE COMPTROLLER CURRENCY,
Washington, D. C., Jan. 24, '77.

I hereby certify the foregoing to be a true and complete copy of the original organization certificate of The Orleans National Banking Association (excepting the list of names, residences, and number of shares of the shareholders thereof) and of the ~~value~~ whole of said original, (with the exception named,) and that said original was filed on the 17th day of May, A. D. 1871, in this office.

In testimony whereof I hereto subscribed my name and caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, this 24th day of January, A. D. 1877.

[SEAL.] JNO. JAY KNOX,
Comptroller of the Currency.

Organization certificate.

We, the undersigned, the directors of the Bank of New Orleans, in the State of Louisiana, do hereby declare that the owners of two-thirds of
the capital stock of said bank have authorized the directors of said
42 bank to make the necessary organization certificate and to
change and convert the said bank into a national association,
under the provisions of the act of Congress entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3, 1864, and by virtue of said authority, and in accordance with the provisions and requirements of the forty-fourth section of said act, we do hereby make and execute this organization certificate.

First. The name and title of this association shall be The New Orleans National Banking Association.

Second. The said association shall be located and continued in the city of New Orleans, parish of Orleans, and State of Louisiana, where its operations of discount and deposit are to be carried on.

Third. The capital-stock of this association shall be six hundred

thousand dollars, ($600,000.00,) and the same shall be divided into twenty thousand shares of thirty dollars each, as it is now divided in
43 the said Bank of New Orleans.

Fourth. The name and residence of each of the stockholders of the said Bank of New Orleans, which is to become a national bank under the provisions of the act of Congress aforesaid, and the number of shares of thirty dollars each held by each stockholder, are as follows:

Fifth. This certificate is made in order that the said Bank of New Orleans and the stockholders thereof may avail themselves of the advantages of the aforesaid act, and that the said Bank of New Orleans may be changed and converted into a national banking association, under the name and title of The New Orleans National Banking Association.

In witness whereof we have hereunto set our hands this third day of April, eighteen hundred and seventy-one.

C. CAVAROC.
F. E. BERNARD.
CHARLES DE RUYTER.
WM. VON PHUL.
A. THIBAUT.
LEON HAAS, JR.
44 F. B. FLEITAS.
S. CAMBON.
E. K. CONVERSE.
E. F. MIONTON.
J. ALDIGE.
P. S. WILTZ.

[5-ct. stamp. G. L. G., jr., not. pub. 3rd April, 1871.]

STATE OF LOUISIANA,
Parish of Orleans, *ss* :

On this the third day of April, A. D. 1871, personally came before me, a notary public duly commissioned and qualified in and of said parish, Charles Cavaroc, E. F. Mioton, P. S. Wiltz, Charles de Ruyter, F. E. Bernard, F. B. Fleitas, E. K. Converse, S. Cambon, A. Thibaut, Jules Aldige, Leon Hass, jr., and Wm. Von Phul, directors of the Bank of New Orleans, to me well known, who severally acknowledged that they executed the foregoing certificate for the purposes therein mentioned.

Witness my hand and seal of office the day and year aforesaid.

[SEAL OF NOTARY.] G. L. GARDEM, JR.,
Not. Pub.

Admitted in evidence.

CARLISLE & McPHERSON.

Filed 23rd April, 1877.

45 *Comptroller's certificate to the New Orleans National Banking Association—Authority to commence banking.*

I hereby certify the annexed to be a true and complete copy of the *copy of the* certificate of authority authorizing the New Orleans National Banking Association to commence the business of banking, retained by this office at the time of the organization of said bank, and the whole of said copy as the same appears on the records of this office.

In testimony whereof I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, this 24th day of January, A. D. 1877.

[SEAL.] JNO. JAY KNOX,
Comptroller of the Currency.

No. 1825.] TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
Washington, May 27th, 1871.

Whereas, by satisfactory evidence presented to the undersigned, it has been made to appear that the New Orleans National Banking Association, in the city of New Orleans, in the parish of Orleans, and State of Louisiana, has been duly organized under and according to the requirements of the act of Congress entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3, 1864, and has complied with all the provisions of said act required to be complied with before commencing the business of banking under said act:

Now, therefore, I, Hiland R. Hubbard, Comptroller of the Currency, do hereby certify that The New Orleans National Banking Association in the city of New Orleans, in the parish of Orleans, and State of Louisiana, is authorized to commence the business of banking under the act aforesaid.

In testimony whereof witness my hand and seal of office this 27th day of May, 1871.

HILAND R. HUBBARD,
Comptroller of the Currency.

Admitted in evidence.

CARLISLE & McPHERSON.

Filed 23 April, 1877.

47 *Facts agreed.*

Supreme Court of the United States. Of the term of October, 1876.

N. W. CASEY, RECEIVER OF THE NEW ORLEANS National Banking Association, plaintiff, *vs.* COUNT GOFFREDO GALLI, DEFENDANT.	Original action No. 15. In debt.

It is hereby agreed that upon the trial of the above-entitled cause upon the facts, it will be conceded and admitted in evidence by the said defendant—

1st. That said New Orleans National Banking Association failed and suspended business on the fourth (4) day of October, 1873.

2nd. That at the date of said failure and suspension said defendant was the owner of fifty (50) shares of the capital stock of said banking association, of the par value of thirty (30) dollars each.

3. That at the date of the commencement of this suit said defendant was, and still is, vice-consul for the kingdom of Italy (of which king-

dom he is also a subject) at the city of Philadelphia, in and for the State of Pennsylvania, where he resides.

CARLISLE & McPHERSON,
Atty'. for Deft.

WASHINGTON, D. C., *April* 23, 1877.

Filed 23 April, 1877.

Admitted in evidence.

CARLISLE & McPHERSON.

48 *Order of Comptroller of Currency to Casey, receiver, to sue shar'-holders.*

TREASURY DEPARTMENT,
OFFICE COMPTROLLER CURRENCY,
July 7, '75.

SIR: Having determined that in order to discharge the leagal debts and liabilities of the New Orleans National Banking Association it will be necessary to enforce and collect the whole amount of the personal liability of the individual stockholders owning stock at the date of the suspension of said bank, so far as the same can be done by legal proceedings, you are directed at once to institute such legal proceedings in the proper court as may be necessary to enforce against each and every shareholder of said bank owning stock or any interest therein, at the time said bank suspended, his or her personal liability as such
49 stockholder, under the provisions of section 5151 of the Revised Statutes of the United States; and this order must be held to extend to all cases save those where, because of bankruptcy or apparent insolvency, such legal proceedings would be of no avail.

Very respectfully,

JNO. JAY KNOX,
Comptroller of Currency.

N. W. CASEY, Esq.,
Rec'r New Orleans Nat'l B'k'g Ass'n, New Orleans, La.

Admitted in evidence.

CARLISLE & McPHERSON.

Filed 23 April, 1877.

50 *Letter Comptroller Currency as to his order to sue shareholders.*

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
Washington, Apr. 19th, 1877.

SIR: In the original suit of N. W. Casey, receiver of the N. O. National Banking Association, plaintiff, vs. Count Goffredi Galle, defendant, now pending in the Supreme Court of the U. S., I understand the defendant, by one of his pleas, asserts or attempts to assert that in my order to said receiver of July 7th, 1875, directing him to enforce the whole amount of the personal liability of the shareholders of said bank and to take such legal proceedings in the proper court as might be necessary to that end, I assumed to relieve and discharge all bankrupt and insolvent shareholders of said bank from such liability and from the force and effect of said order. This is an entire mistake. Neither by that order nor by any other have I assumed to relieve any one of said

shareholders from liability to the full extent of the par value of his stock, but, on the contrary, said receiver has been instructed and
51 understands that it was and is my purpose to hold every shareholder thus liable, and to collect from each all that is possible until such personal liability is fully exhausted.

I presume defendants' counsel rely upon the closing language of the aforesaid order, but that language was only intended to excuse the receiver from commencing suits at once against such shareholders as might be so notoriously bankrupt or insolvent that a suit or suits against them could have no other present or final result than the useless expenditure of the moneys of the bank, and the receiver so understood it. I cannot believe it my duty to waste the assets of the bank, already in hand, by instituting legal proceedings against shareholders when it is absolutely certain that nothing could be collected by suit.

Meantime my order and determination remain in force, that the shareholders of said bank must all be held liable to the extent of the par value of their stock, and I may add that, so far as known, no one has been excused from suit on account of such bankruptcy or insolvency or upon any other ground.

52 Very respectfully,

JNO. JAY KNOX,
Comptroller.

Hon. CHAS. CASE,
Attorney, &c., Washington, D. C.

Admitted in evidence.

CARLISLE & McPHERSON.

Filed 23 April, 1877.

53 *Letter Comptroller to receiver.*

(Copy.)

TREASURY DEPARTMENT,
OFFICE COMPTROLLER OF CURRENCY,
Washington, D. C., July 8, 1875.

SIR: I have received your letter of the 23rd inst., enclosing a decision of Judge Wood, of the U. S. circuit court, upon suits brought against Credit Mobilier, National Park Bank, et al. You advise me that an appeal has been taken to the U. S. Supreme Court, where I trust the expectation of the attorneys may be realized in a reversal of the opinion of Judge Wood, though I must confess I have but little hope of such a result, except, possibly, in the case of the Credit Mobilier. Please advise me what party now holds the bills receivable involved in this litigation, and what amount of such bills has been paid, and whether those bills have matured, are in process of collection, and what is the probable amount to be realized upon them during the pending litigation.

You state that the condition of the association is such that there is no doubt but that the shareholders will have to be called upon
54 for the full amount of the par value of their stock; and in accordance with your suggestion I mailed you yesterday instructions for making an immediate assessment upon the shareholders of the bank for the full amount of their individual liability. I will write you again

in a few days in reference to the propriety of making a small dividend to creditors.

Very respectfully,

JNO. JAY KNOX,
Comptroller.

N. W. CASEY,
Receiver N. O. Nat'l B'k'g Ass'n, New Orleans, La.

Admitted in evidence.

CARLISLE & McPHERSON.

Filed 23rd April, 1877.

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55 *Casey's appointment as receiver.*

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF CURRENCY,
Washington, D. C., June 23rd, 1874.

Whereas John Cockran was duly appointed and commissioned receiver of "The New Orleans National Banking Association," in the State of Louisiana, on the 25th day of October, 1873; and whereas said John Cockren has resigned, his resignation to take effect upon the appointment of his successor:

Now, therefore, be it known that I, John Jay Knox, Comptroller of the Currency, do hereby appoint N. W. Casey to be receiver of "The New Orleans National Banking Association," with all the powers, duties, and responsibilities given to or imposed upon a receiver, under the provisions of the act entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3rd, 1864.

In witness whereof I have hereunto subscribed my name and have caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, the day and year first above written. 56

[SEAL OF COMPTROLLER.]

JOHN JAY KNOX,
Comptroller of the Currency.

I hereby certify the foregoing to be a true and complete copy of the commission of N. W. Casey as receiver of "The New Orleans National Banking Association," La., and of the whole of such copy, as the same appears from the records of this office.

In witness whereof I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, this 21st day of April, A. D. 1877.

[SEAL.]

JNO. JAY KNOX,
Comptroller of the Currency.

In the Supreme Court of the United States,

OF THE TERM OF OCTOBER, 1876.

ORIGINAL NO. 15, IN DEBT.

NICHOLAS W. CASEY, RECEIVER OF THE NEW ORLEANS NATIONAL BANKING ASSOCIATION, PLAINTIFF,

vs.

COUNT GOFFREDO GALLI, DEFENDANT.

BRIEF FOR PLAINTIFF IN SUPPORT OF DEMURRERS TO PLEAS IN BAR.

We shall best serve the ends of justice, as well as the pleasure of the court, by making this paper literally what it is by name—*brief*. Necessarily, honorable judges must read the two pleas now demurred to, and to our minds it is so clear that upon such reading their insufficiency will be manifest, that it would seem to be mere waste of time to multiply words upon the subject.

To the second plea in bar, our demurrer is special, and we are content to rely upon the objections specified, though it is believed a general demurrer would reach it. Giving to this plea the most liberal construction possible in favor of defendant, it amounts only to a denial that the Comptroller had, before suit brought, made any sufficient determination and order to enforce the individual liability of the shareholders. That this amounts to no more than the plea of *Nil Debet*, already in, is too plain for argument. In "Kennedy *vs.* Gibson," (8 Wallace, 498,) it was decided that in a suit to enforce such liability such determination and order of the Comptroller must be averred, and, if put in issue, must be proved on the trial. The averment being thus material to establish the indebtness, argument is unnecessary to show that *Nil Debet* puts it in issue.

Again, it is only *argumentatively* that it is possible to give this plea the favorable construction before-mentioned. Suppose the order of the Comptroller to the plaintiff is construed to read: "You need not sue a shareholder when by reason of his bankruptcy, or unquestionable insolvency, it is certain that a suit would be of no avail?" Until it is averred by the plea that some one of the shareholders was thus bankrupt or insolvent it does not appear that any one of them is in any sense excused from contributing. There is no such averment, and therefore it is at most only by a possible inference that it can be claimed that the Comptroller made any exception.

It seems to us that nothing more need be said as to this second plea. It does not pretend to set out the order of the Comptroller *in haec verba*, or perhaps there might be something to add as to its legal meaning. When the Comptroller decides that in order to pay the debts of an insolvent bank it is necessary to enforce the individual liability of shareholders to the extent of the par value of all stock, and so orders, certainly it does not diminish the liability of a solvent shareholder that another is insolvent, and cannot be forced to pay anything; and it is equally certain that in such a condition of matters the law does not require the Comptroller to do a worse than useless act, and, to use a common phrase, "throw away good money after bad." But this discussion does not belong here, nor probably in any future stage of the case.

The third plea in bar may be disposed of by remarking that the rulings of this court, not only in "Kennedy *vs.* Gibson, supra," but in this very case, pronounce it bad. Upon reading it honorable judges will observe that it attempts to set up as a defense that the Comptroller was mistaken, and had erred in his determination and order to call upon the shareholders, thus seeking to question just what this court say in "Kennedy *vs.* Gibson," and re-affirm in this case, a shareholder is not permitted to dispute. In substance, this plea avers that the Comptroller has allowed certain claims against the bank (all based upon foreign bills of exchange) that were illegal, and that if he had not taken these into the account, he would have found, or should have found, the assets of the bank adequate to pay all other valid liabilities. This statement of the purport of the plea sufficiently establishes its deficiency in substance; and thus we are disposed to leave it, merely mentioning, without elaborating, one or two other points which might be pressed. For example: Conceding the right of a shareholder to question the Comptroller's decision, as this plea attempts to do, it may still remain that no such error of judgment is shown as can be of any avail. All the transactions excepted to grow out of the purchase or sale of exchange—legitimate business of the bank, as prescribed by law—and if in some instances, or in all, bills were bought or sold against no funds in the hands of the drawee, it by no means follows that the bank was not or is not liable to *bona fide* holders.

This leads us to suggest finally, that in our judgment defendant wrongly construes the prohibition of the currency act upon which he seems to rely. The section referred to (R. S., sec. 5202,) is directory, and prescribes in effect that a National Bank must not be liable on bills not drawn against money actually on deposit to its credit, or due thereto. But suppose a bill is actually negotiated in disregard of this enactment? The bank gets pay—receives full value from the purchaser, who is the payee. If it is dishonored, is not the bank liable to him? Must the payee of the bill inquire at his peril whether there are funds with the drawee to meet it? If, on the other hand, the drawee having no funds still elects to honor the bill, does this enactment make the paper void in his hands?

We are aware that this question is settled upon authority. The case of "Ossippee Manufacturing Company *vs.* Canney," (54 N. H., 295,) being one case in point which now occurs to us; but we cannot think it essential to cite the adjudications.

ROUSE & GRANT, AND CHAS. CASE,
Of Counsel and Attorneys for Plaintiff.

In the Supreme Court of the United States

OF THE TERM OF OCTOBER, 1876.

ORIGINAL ACTION, NO. 15, IN DEBT.

NICHOLAS W. CASEY, RECEIVER OF THE NEW ORLEANS NATIONAL BANKING ASSOCIATION,
PLAINTIFF,

vs.

COUNT GOFFREDO GALLI, DEFENDANT.

FINAL BRIEF FOR PLAINTIFF ON THE MERITS, WITH PRELIMINARY STATEMENT AND ADDITIONAL SUGGESTIONS AS TO THE DEMURRER TO THE SECOND PLEA IN BAR, AND THE BRIEF IN SUPPORT THEREOF.

Preliminary to a discussion of the facts in this case, it seems essential (though, we are aware, apparently in technical violation of rule,) to explain briefly a seeming discrepancy between the averments of defendant's second plea in bar and our brief in support of the special demurrer thereto. Without such explanation some of the points made and language used in the brief would seem to be irrelevant and unwarranted. A few additional words may also be proper as to the force of that plea. The facts explanatory are as follows:

Said second plea, as it was originally framed, as it stood when demurred to, and even until after our brief was prepared, printed, and filed, differed from its present reading in this: that in no part of it was there any averment that any of said shareholders were, *at any time*, insolvent, and the brief was made up accordingly. The plea was filed April 9, (Rec., p. 10.) Our demurrer was put in the next day, April 10, (Rec., p. 14 ;) and on the 17th of April defendant's counsel filed their joinder in demurrer, (Rec., same page.) After all this, and, as we have said, after our brief was filed, counsel for both parties met, on the 20th instant, at the office of the clerk of this Court, to agree upon some points as to the trial. It was at this time that the attorney for the defendant renewed a request, which he had made by letter the day previous, to amend this plea in the particular above specified, stating that otherwise he should apply to the court for such leave when the case was called, which might work a further postponement of the final hearing.

Foreseeing that such delay might thus result, counsel for plaintiff assented to the proposed amendment; and thereupon defendant's attorney interlined in the plea then on file, immediately after the phrase "*because he says that*," these words, to wit: "*some of the shareholders of the said banking association are insolvent and ;*" while at the end, immediately before the last word "*insolvent*," he struck out the words "*may be*" and inserted the word "*are*" in lieu thereof, thus making the plea read as it stands in the printed record.

If honorable judges will take the pains to read the plea, (Rec., p. 10) omiting the sentence interlined as above stated, and substituting the words "*may be*" for the word "*are*" before "*insolvent*," at the close, they will see just what the pleading was when demurred to, how palpably it was open to the objection of argumentativeness; and the pertinency of what is said in the brief upon this point will be equally manifest.

Desiring to let our brief remain on file because it discusses the demurrer to the third plea as well as that to the second, we felt it necessary to make this explanation, at the same time being aware that it is, in a sense, *dehors* the record, though growing out of it, and that it only becomes necessary by reason of a slip-shod practice, never to be commended, and, in this instance, only apologized for, because of our fear of such procrastination as might throw the case over for the term.

Believing the plea as amended to be still objectionable, not only in substance, but for the causes originally assigned, we permit our special demurrer to stand. Giving to it a construction as favorable to the defendant as the most latitudinarian interpretation of the language will warrant, it still remains, that in all its allegations and averments there is nothing that is not equally available as a defense, under the general issue. In other words, it amounts, as it did in the beginning, to no more than the general issue specially pleaded, and perhaps not to that. We need not stop to cite authorities to the point that this is good ground for special demurrer, when the general issue is also in the record, as it is in this instance.

So, also, it requires but few words to demonstrate that the plea is not only defective on the score of argumentativeness, but that, for another reason, it cannot be held good even argumentatively. As already stated, originally it contained no averment that any share-holder was ever insolvent. As it stands in the record, the averment is that some of them *are*, that is, that they are *now*, *at the present time*, insolvent. It is not averred that such was their condition when the Comptroller made his decision and order that they should be held liable; but this is left for argument. That is to say, because they are now insolvent it shall be inferred that such was their *status* at the date of the Comptroller's order.

This brief statement is conclusive as to the argumentativeness of the plea at best; but even this argumentative inference may not be invoked to save it, because of the elementary proposition that legal presumptions as to conditions run always *in futuro*, never backward. To illustrate: proof being made that a given state of things, as, for example, a co-partnership between A and B, existed at a given former period, say New Year's day, 1876, the law will presume the continuance of such co-partnership until the contrary is shown; but *it will not presume* that such copartnership existed one single hour prior to the New Year's day aforesaid. So in the present instance, from the averment that some of the share-holders are now insolvent, the law would presume, in aid of the plea, if that were necessary, that such insolvency will continue, *but never that it was a fact in the past.*

Again: suppose it was the design of the pleader to set up that the Comptroller, in ordering collection from the share-holders to the extent of the par value of their shares, was controlled or influenced by the consideration that from some of them probably nothing could be collected because of insolvency, and therefore ordered collection in full; whereas, if he had not allowed for such insolvency, he could and would have ordered payment of a per centum only. We cannot see that the plea amounts to this; but, from a remark dropped by counsel for defendant, (for we have not seen and dare not wait to see their brief,) we infer they may assume this position. In that event, it is only necessary to refer to the doctrine of Kennedy *vs.* Gibson, 8 Wall., 498, as a conclusive answer to it. It is no more nor less than an attempt to question the decision of the Comptroller by an averment that he acted from unwarrantable data. The court most emphatically say in that case that no share-holder may do this; that "his decision, made upon data satisfactory to him, is not to be questioned in the litigation that may ensue." We feel confident that further discussion of the pleadings is needless.

THE CASE STATED UPON THE EVIDENCE.

Assuming that the demurrers will be sustained, we come to a brief consideration of the case upon the facts. The evidence has been hastily and *badly* printed, but is perhaps sufficiently intelligible for practical purposes. We are aware, too, that much of the proof is secondary in its character, (certified but official copies in lieu of originals,) and that some of it—as, for example, the letters of the Comptroller—might have been objected to on other grounds; but it was all admitted without objection, and is to be taken as legal evidence. What, then, is the case made? The evidence will be found in the record, commencing on page 15, immediately following the waiver of a trial by jury, and is as follows:

First. An official copy, from the Comptroller of the Currency, of the organization certificate of the *New Orleans National Banking Association*, which it seems was filed with said Comptroller May 17, 1871, the names, &c., of share-holders being omitted for the sake of brevity. By mistake of the printer, the Comptroller's certificate precedes instead of appearing at the end of this document. It is put in evidence to show that the association had been a State organization, thus justifying shares of thirty dollars instead of one hundred dollars each. (See R. S., sections 5139 and 5154.)

Second. An official copy, duly certified by the Comptroller, of the final certificate authorizing said association to commence business as a bank, dated May 27, 1871. (See R., pp. 16, 17.) From this it may be inferred that the bank commenced business at least as early as is averred in the declaration. That it did do a banking business, is a legitimate inference from the fact of its subsequent failure.

Third. The written admission of counsel for defendant—1st. That said banking association failed and suspended business on the 4th day of October, 1873; 2d. A like admission that, at the date of said failure, defendant, Galli, was the owner of fifty shares of the capital stock of said bank of the par value above stated, to wit: thirty dollars each; and 3d. That at the commencement of this suit the defendant was, and still is, vice consul for the Kingdom of Italy, as averred in the declaration, of which latter fact it is presumed, however, the court could and would take official notice. (R., pp. 17, 18.)

Fourth. The order of the Comptroller of the Currency of the date of July 7, 1876, to enforce the liability of the shareholders of said bank to the extent of the par value of their shares. (R., p. 18.)

Fifth. Two letters of the Honorable Comptroller of the Currency, one addressed to counsel for plaintiff, (R., pp. 17, 18,) and one addressed to said plaintiff, (R., pp. 19, 20,) which we put in evidence to show more conclusively the meaning and effect of said Comptroller's order, and which will be more particularly noticed hereafter.

Sixth, (and lastly.) An official, certified copy of the commission of plaintiff, showing that he *was*, and *of course is, receiver of the said New Orleans National Banking Association.*

This is the case made by the evidence, none of which was objected to by defendant's counsel, nor did they offer any evidence in contradiction of or to vary that put in by the plaintiff. To us it seems more than sufficient to maintain the action; and so confident are we that it will thus appear to the superior and more experienced minds of honorable judges, that we feel it little less than presumption (as it might be even in a more doubtful case) to attempt to aid them by any comments of ours. And perhaps we may be pardoned for adding, that we have been led to believe that the hope of even defendant's counsel has been, and is, in their special pleas, (more especially the third and last,) and that if these fail, they scarcely hope to make a successful stand upon the facts.

Upon one point only there may be room for a *show* of controversy. We refer to the order of the Comptroller; and as to this it is easy to demonstrate that the only objection that can be made to it is merely specious.

From what is averred in the second plea in bar, we may suspect, (though we do not know,) that the defendant's counsel may object to the Comptroller's order of July 7, 1875, because of its closing clause. In anticipation of such possible objection, we submit the following suggestions, among many that might be offered to the same point:

First. Said order, taken as a whole, is equivalent to this proposition: that the Comptroller directed collection to the extent of the par value of the shares against all shareholders, and concluded by saying to the receiver "*only impossibility of collection will be taken to excuse you from this duty in any instance.*" Certainly this is the strongest construction against us which the language of the order will warrant; and, in view of it, it might suffice to ask, does the law ever command what is impossible?

Second. Another view that may be taken is that mentioned by the Comptroller in his letter to plaintiff's attorney, (Rec., pp. 18 and 19,) viz: it had reference only to efforts to collect by *suit*, and that, too, at *once*, in instances where the sole possible result would be the waste of moneys in hand, in costs, and fees of counsel. At most, it did not remit the receiver from attempting collection by any and every other feasible mode, nor absolutely and unconditionally from *sueing* at a later period.

Third. We put in evidence the letter of the Comptroller above mentioned, and also his earlier letter to the plaintiff, (Rec., pp. 19 and 20,) to prove, as they conclusively do, that both by the Comptroller and the receiver was it well understood, from the beginning, that the order in question extended to all shareholders, and, as to holding all liable, was absolute, unconditional, and universal. Only the closing portion of the last-named letter is material. It is dated the day following the order, and contains this language: "I mailed you yesterday instructions for making an immediate assessment upon the shareholders of the bank for the full amount of their individual liability." So, also, in the first-mentioned letter, he says: "Neither by that order, or by any other, have I assumed to relieve any one of said shareholders from liability to the full extent of the par value of his stock; but on the contrary, said receiver has been instructed, and understands that it was and is my purpose, to hold every shareholder thus liable, and to collect from each all that is possible, until such personal liability is fully exhausted." And, we ask, what more the Comptroller could do than what he here says was, and is, purposed?

True, he adds, an explanation in which we certainly concur. Take a hypothetical case. Suppose an order in general terms is issued to a receiver to enforce the individual liabilities of shareholders. The latter, upon investigation preparatory to enforcing it, ascertains that one shareholder (who was also director and president of the bank when it failed) is insolvent, to the verge of street mendicancy—reduced to "*sponging*" the stimulants upon which alone he lives. Within a month he dies, and is buried, as it were, almost from the gutter, only escaping a pauper's funeral because former friends, out of charity, come to the rescue. Suppose, in this case, the receiver did not sue, will it be said because his order contained no exception that he should have done so? And if he was justified in not sueing, is not an order equally legal which excuses suits, or at least postpones them, in instances where collection would be as impossible as it was in the case supposed? True, the case put is hypothetical and extreme, but extreme cases only more forcibly illustrate a point, and the writer of this brief could name the exact parallel of the instance supposed in actual experience.

Fourth, (and finally.) No share-holder has in fact been excused (from suit even) on account of bankruptcy or insolvency. (See close of Comptroller's letter to plaintiff's attorney, R., p. 19.)

Other points in favor of the sufficiency of the order could be, and would be, suggested if we could think it essential to do so, but our fear is that we have already trespassed upon the patience of the court.

Defendant's shares amount to fifteen hundred dollars, which constitutes the *debt* we are entitled to recover. It has already been decided in this case that interest runs upon the amount of this debt from the date of the Comptroller's order.

The law of the State of Louisiana as to interest is in these words: "Interest is either legal or conventional. Legal interest is fixed at the following rates, to wit: At five per cent. on all sums which are the object of judicial demand, whence this is called judicial interest; and on all sums discounted by banks, at the rate established by their charters." (See Civil Code of Louisiana, art. 2924, and acts of 1855, p. 352.)

We claim judicial interest from July 7, 1875, to May 7, 1877, one year and ten months, amounting to $137.50, for which we ask judgment, as damages.

ROUSE & GRANT,
And CHARLES CASE,
Of Counsel, and Attorneys for Plaintiff.

Supreme Court of the United States.

OCTOBER TERM, 1877.

NICHOLAS W. CASEY,
RECEIVER OF THE NEW ORLEANS NATIONAL BANKING ASSOCIATION.

vs.

COUNT GOFFREDO GALLI.

ORIGINAL NO. 15.

Argument for the Trial on the Merits.

This case stands for trial upon three pleas; a plea of the general issue and two special pleas.

The plaintiff seeks to enforce the individual responsibility of the defendant as shareholder in the New Orleans National Banking Association, for the debts of that association.

The declaration was demurred to because it did not show how much the association owed, and what were the assets, but only averred that the comptroller had ascertained and determined that it was necessary to enforce the individual liability to the full extent of the amount of the stock. And for the defendant it was argued that unless the amount of debts and assets were shown it could not be known what deficiencies the shareholders were to supply and what part thereof this defendant was to contribute.

This demurrer was overruled, on the ground that the amount to be contributed was conclusively determined by the comptroller.

The two special pleas impeach this determination as being made in violation of law.

1st. Because certain of the shareholders are insolvent and the comptroller directed the exaction of the full par value of the stock from all the other and solvent stockholders, in order to procure from the solvent stockholders alone sufficient money to pay the debts of the said corporation.

2d. That among the debts so intended to be paid, and which would be paid out of the money to be recovered from this defendant, were debts of the bank for borrowed money, liabilities of the bank as drawer of bills of exchange upon persons who had no funds of the bank and who were not in debt to the bank, and liabilities of the bank as endorser of certain bills of exchange, these being debts of the bank for which the shareholders under the law are not liable.

I.

It may be answered on the other side that the defendants are concluded as to these matters by the comptroller's decision. But this is not so. The special pleas impeach the comptroller's decision as being in direct violation of the act of Congress, and so invalid; and to allow the decision itself to conclude the defendants in this matter would be to disregard the maxim, *non potest adduci exceptio ejus cujus dissolutio petitur*.

The defendant submits that the decision of the comptroller might be impeached for fraud, and may be impeached for mistake, or any matter which in fact renders it unlawful. If the comptroller, intending to decide according to law, has erred, or if, basing his decision upon certain facts, he has fallen into error as to the facts, and such error is brought to the judicial notice of the court, the court, we submit, will pass upon the sufficiency of the law or the facts to sustain his decision. The decision of the comptroller is not a judicial act; and even a judgment is not conclusive upon parties who had no opportunity to be heard.

In Slee *vs.* Bloom and others, 20 Johnson, 669, a creditor, seeking to enforce the individual liability of shareholders, gave in evidence a judgment obtained against the corporation upon a bond given to secure the amount of the valuation of certain property. The defendants offered evidence to impeach it. The chancellor having held that it was not binding upon the shareholders, the court of appeals held that it was binding and conclusive unless impeached for fraud or error. The court said:

"The questions now come up for the first time whether from the pleadings and proofs in the cause the judgment rendered in favor of the appellant against the company is binding and conclusive on the respondents in their individual capacity; whether sufficient foundation has been laid by the pleadings for opening the judgment and the account on which it is founded; and whether the respondents can be permitted to show before a master a material undervaluation of the property sold by the appellant to the company for any cause." (P. 683.) And after discussion of the principles of law, continued: "If then it has been shown that the sum claimed as a debt was fraudulently enhanced, or that the liquidation of the account is either fraudulent or *founded in error*, provided a foundation has been laid for such proof, the respondents would be entitled to relief. And we must regard the judgment as a solemn admission merely on the part of the company of indebtedness, for it is not of itself, as *res judicata*, binding on the stockholders if it was procured by fraud or is *founded in error*." The court then proceeds to examine the transactions on which the judgment was founded. It does not appear to have been alleged that the judgment was obtained by fraud or mistake, but only that there was "fraud or error in such accounts;" *i. e.*, the accounts on which the judgment was founded. (P. 671.)

II.

The right to plead these facts in defence is sustained by the case of the Empire Bank, 18 N. Y., 199. Under the banking act of New York, of which the national banking act is an abridgment, leaving unprovided for many details worked out in the New York act, upon the failure of a State bank, the court appoints a receiver, who collects and applies the assets of the bank to payment of creditors, and when necessary to enforce the individual liability he reports his proceedings to the court, together with a list of debts and assets, and the names of the stockholders and the amount of stock held by each, and the cause is then referred to a referee who apportions the debts and liabilities among the stockholders.

In the case of the Empire Bank such proceedings took place; the referee made his report stating amount of debts and the amount thereof to be paid by each stockholder, and the judge made an order requiring the parties interested to show cause why the report should not be confirmed. The question then arose whether the stockholders had the right to contest claims made against the bank, or whether the admission of the receiver of a debt due by the bank was conclusive against the stockholders, and their defence was to be confined to a denial of their obligations as ascertained by the referee.

On this point, the court said:

"Another and more difficult question arises upon the provisions of the act for ascertaining the debts due from the insolvent corporations with which the stockholders are to be charged. Upon one construction of the act the account of debts and liabilities of the bank is to be taken as conclusively established by the receiver upon an *ex parte* examination to be made by him, and the stockholders who are obliged to pay them are deprived of any opportunity of appearing or contesting that question; and the aggregate of the debts so established is to be apportioned by the referee among the stockholders in proportion to their respective shares of the stock, and judgment is eventually to be rendered according to the apportionment after it has been revised and confirmed by the court. Thus, it is argued, the amount of the burdens which is thrown upon the stockholders—which is, in its nature, a judicial question—is conclusively determined in a proceeding not judicial in its nature, and by a person who is not a judicial officer, and by a process which precludes all litigation on the part of the persons who are to be charged." (P. 211.)

The court then proceeds to examine the act, and does not find that it *requires* the receiver's report to be received as conclusive. "If," says the court, "it had been intended that the receiver's report of debts should form the basis of the apportionment, the section would have been declared that the amount so reported should be divided. *Again, we are not, in the absence of precise language, to intend that a matter so strictly judicial would be committed to persons whose duties, in all other respects, relate to matters of administration. And, moreover, the act, should, if practicable, be so construed that it should not violate any constitutional provision or any common principle of justice.*" [We submit, with confidence, that the rule of decision last enunciated will be the rule of this court without the qualification, "if practicable."] The court, therefore, decided that the receiver's report might be contested before the referee.

"Upon mature reflection," said Justice Davis, delivering the opinion of the court: "I have come to the conclusion that *the referee* is to pass upon and determine the amount of the debts to be paid as well as the parties who are to pay them, and that he is not obliged to take the receiver's statement of debts as conclusive. * * * It is quite consistent with this view that the referee should take the receiver's list of creditors as presumptive evidence of the amount of the burthen to be apportioned among the stockholders subject to be modified by the proofs and allegations of the stockholders or creditors." P. 212.

This case is noted in Brightly's New York Digest, of 1875, in the list of overruled cases, as having overruled the same case in 4 Abb. Pr. Reports, [not on this point,] but not as having been overruled or doubted, and is therefore, we understand, now settled law in New York.

The referee's report is thus open to exceptions, and an appeal lying from the judgment of the court upon such exceptions, it follows that in New York under the banking act the stockholder may defend a suit brought to enforce his individual liability by contesting claims against the corporation.

The application of this decision is as direct as the difference in the two proceedings will permit. The essential feature of the right allowed in New York and claimed here is, that when the judicial power is first invoked to enforce the individual liability, the stockholder is permitted to show, if he can, that his money ought not to be taken from him to pay debts for which he is not liable.

It may be said that the decision of the court proceeded upon the terms of the statute, but it is not so. The claim of the stockholders to be heard was based only upon their right not to have their property taken from them without their being heard to dispute the facts on which the demand was based. It was not claimed as given expressly in the statute. And the reasoning of the court upon the statute was rather addressed to show that the statute did not forbid that they should be heard and that its terms were sufficient to allow it.

The same reasoning applies to the National Banking act, in which we find less reason to exclude the defence. For the provision which in the New York act directs the receiver to render the court " a particular account of such debts and liabilities so remaining unsatisfied," (sec 289) in order to the collection from the stockholders of money to pay them, and which seems to have been relied on in the case of the Empire City Bank, as rendering that report conclusive of the amount to be levied, finds no parallel in the National Bank act, nor is any expression found therein expressly conferring equal authority on the comptroller. The power to determine the amount to be paid by the shareholders under the National Bank act is derived, by implication only, from the duty to ascertain claims against the bank and pay them, both which duties the receiver, under the New York bank act, had also (sec. 286, 287) ; thus uniting the functions in that respect divided by the Nationa Bank act between the comptroller and the receiver.

III.

We do not say there is no case, but we have not, in any of our researches on the subject, found any case, under any State statute, imposing individual liability for debts of a corporation, in which the defendant was held to be concluded absolutely by any extrajudicial decision, or any decision which he had no opportunity to be heard to oppose.

Should the opportunity here presented to contest the shareholder's liability for the debts admitted by the complainants be lost, the defendant apprehends that he will be without remedy. A bill in equity may possibly be resorted to, but there are grave doubts whether that remedy would be effective. The language of this court in United States *vs.* Boutwell, in regard to the writ of mandamus to the Secretary of the Treasury would probably apply to the writ of injunction. If directed to the comptroller, "the writ does not reach the office, it cannot be directed to it." 17 Wall., 604, 607.

The shareholders believe they are reduced to this condition: that if this defence be excluded, not only will a portion of the stockholders be compelled to pay all the debts of the bank, but that they will be compelled to pay debts of the bank which, under the act, they are not liable to pay, and debts for which, under the act, the bank itself is expressly declared not liable beyond its assets.

In this case of the Empire Bank, the court plainly declares that the question, whether the debt be one for which the shareholder is liable is, "in its nature a judicial question," "strictly judicial," and that to deny a judicial determination would violate a "common principle of justice." And such being the question this court has declared in 18 How., 284, that Congress cannot withdraw it from judicial cognizance, and entrust to the determination of an executive officer. Its language is:

"To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or in admirality, nor, on the other hand, can it bring under the judicial power a matter which from its nature, is not a subject for judicial determination."

IV.

It appears to us, therefore, the question is still open on two points.

1st. That it may be shown that the comptroller's view of the law, and his order issued upon that view, is that he may exact from a portion of the shareholders less than the whole, enough money to pay all the debts of the association, and so to make one shareholder liable for another, and to make some liable unequally.

2d. That it may be shown that the comptroller has included among the debts of the bank, to pay which he is exacting this sum from the defendant, certain debts for which the bank may be liable, but the shareholders are not liable.

V.

The second plea alleges, and the demurrer admits, that the comptroller, in determining the amount to be exacted from the stockholders has determined to exact from a number of stockholders less than the whole a sum sufficient to pay the debts of the association, and has assessed the amount payable by this defendant upon that basis and with that intent.

It seems only necessary to place the averments of the plea in juxtaposition with the requirements of the law to see that the latter has been violated. The act provides (sec. 5151) that the shareholders "shall be held individually responsible, *equally and ratably, and not one for another*, for all contracts, debts," &c. The plea avers that all the debts have been imposed upon a part of the stockholders less than the whole.

But it will be said that if too much be exacted from the shareholder, the surplus will be returned.

This, if so, we conceive would not alter the question. The taking of his property without process of law, cannot be justified by even the certainty of the return of the whole, still less by a provision that so much as the comptroller does not use shall be returned. But we find in the act no such provision.

The New York act, sec. 299, provides that, if after paying debts there shall come into the receiver's hands, any of the assets or effects, they shall be distributed to the stockholders among whom the liabilities were apportioned "in just and equal proportion to the sums contributed by them."

There is no such provision in the National Banking Act. The only provision that authorizes anything to be returned to the stockholders is that in section 5236, which authorizes the surplus of the proceeds of the assets of the association to be distributed among the "shareholders in proportion to the stock by them respectively held." This is only the general provision in regard to the distribution of surplus *assets*. If it had contemplated the return of the surplus contributions, or the reimbursement of the contributors it would have contained a provision like the New York act.

But the distribution here directed is of the "*proceeds of the assets*." Now these contributions are not assets.

If A be bound to pay B's debts, or if A and B be bound to pay the same debt, and B becomes insolvent or dies, A's liability is not assets of B.

In Dutcher, Assignee, *vs.* The National Marine Bank, 12 Blatchford, 435, the complainant was assignee of Central Bank of Brooklyn, a corporation created by the laws of New York. The defendant was a stockholder in that corporation. The object of the bill was to enforce the individual liability of the said stockholder. The defendant demurred.

The Bankruptcy Act, R S, sec. 5122, extends to corporations, and provides that all their property and "assets" shall be distributed to their creditors under said act. The question was thus directly presented, whether the individual liability of a shareholder was "assets."

Judge Woodruff held the demurrer well taken, and said "the liability thus provided for is purely collateral to the liability of the bankrupt debtor * * * it is neither property, nor a right of property, nor a credit of the bankrupt. In some broad sense, having respect to the rights of creditors, it may be called a provision for the payment of debts, and, in that sense, as insisted by the counsel for the complainant's, "assets," but not assets of the bankrupt. * * * It is not like unpaid subscriptions to the capital stock as in Sawyer *vs.* Hoag (17 Wall., 610), for the liability of the stockholder there was a liability to the corporation and passed as such to the assignee in bankruptcy."

Thus the contributions of the stockholders are not assets, and no provision for the return of them, or any part of them, is made in the act.

VI.

The third plea alleges that the money of the defendant is sought to be exacted from him for the purpose of paying debts for which, though the bank be liable, the shareholders are not.

Section 5202 of the revised statutes is as follows:

"No association shall at any time be indebted *or in any way liable* to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demand of the natures following:

First. Notes of circulation.

Second. Monies deposited with or collected by the association.

Third. Bills of exchange or drafts drawns against money actually on deposit to the credit of the association or due thereto.

Fourth. Liabilities to the stockholders of the association for dividends and revenue profits."

What is the application of this section to the dealings of banks? What is meant by the words shall not be liable beyond the amount of capital stock paid in and undiminished?

The property of a bank is acquired in two ways; *first*, by the contributions of the shareholders called capital, for which the bank pays nothing; and, *second*, by deposits, collections, &c., in the course of trade, for which the bank becomes liable to the amount, or nearly the amount, of the property acquired.

For every debt incurred honestly by a bank, it must at least get nominal value, and if its assets are worth what they cost they will always equal its debts, barring of course misappropriation and robbery. The capital stock is a security against depreciation, misappropriation, or other loss, and though these assets are contemplated by the act as being an addition to them, so in the section cited, the capital stock, though mingled with and forming part of the assets of the bank, and undiscernable, is spoken of as a separate fund. This section declares that the security for debts of the non-enumerated class shall not extend beyond the capital stock which is regarded as a kind of security.

The plea alleges that the comptroller is suing the defendant for money to pay a large amount of debts not included in the four excepted classes, that is to say, for borrowed money, $400,000, for drafts drawn upon persons who neither held money to the credit of the association nor was indebted to it, and for drafts endorsed by the association.

We submit that all claimants against the association except those specified in the section cited, must look for satisfaction only to the stock of the association. The association is not liable beyond its stock for borrowed money, or as drawer or endorser of drafts. The creditors who trusted the association in such matters dealt with it on the credit of its stock, and not on the credit of its shareholders.

VII.

But says the plaintiff's counsel: "The section referred to is directory, and prescribes in effect that a national bank must not be liable on bills not drawn against money actually on deposit or due thereto." [The counsel here is obscure. He must mean that the direction is that the bank shall not draw bills except against money on deposit.] And he asks, suppose a bill is actually negotiated in disregard of this enactment, is not the bank liable to the payee? We answer, undoubtedly the bank is, under the bank act, and would be liable if the language of the act were such as the counsel interprets it to be. The liability of the bank is not denied, nor that all the means of the bank must be applied to discharge that liability. But what we do deny is that the liability shall, in the teeth of the statute, be held to extend beyond the property of the bank. And, again, asks the counsel: "If, on the other hand, the drawee, having no funds, still elects to honor the bill, does this enactment make the paper void in his hands?" We answer, certainly not. The enactment does no such thing; the bill is a good and valid bill, and the holder has the same right and remedy against this national bank and all its property and assets that the holder of a bill drawn by the old United States bank had against that corporation; that is, the right to subject all its property to the payment of the bill, and nothing more.

The case of the Manufacturing Company *vs.* Canney (54 N. H., 295) cited for the plaintiff not only does not sustain the plaintiff's argument, but by contrast sustains the defendants. In that case the statute provided that "no corporation, banks and insurance companies excepted, shall contract debts or incur liabilities exceeding one half its capital stock then actually paid in and unimpaired, and of its other property and assets."

It was proved that the amount of debts exceeded the limit, and the defendant contended that the excess was void as *ultra vires*.

The court cited and relied on Monument National Bank *vs* Globe Works (101 Mass., 57) and Bissell *vs.* Railroad. (22 N. Y., 289) In the former it was said "when the transaction is not the exercise of a power conferred on the corporation, but the abuse of a general power in a particular instance, the abuse not being known to the other contracting party, the doctrine of *ultra vires* does not apply." And in the latter it was said "when the want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defence of *ultra vires* is available, but such a defence would not be permitted to prevail against a party who cannot be presumed to have any knowledge of the want of authority to make the contract. Hence if the question of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts resting peculiarly within the knowledge of the corporate officers, then the corporation would be estopped from denying that which by assuming to make the contract it had virtually affirmed."

The court having cited these passages then proceeded (p. 326) to apply "the doctrine thus laid down," and held that as the creditors could not know whether their demands did or did not exceed half the capital stock and assets, the defence could not be sustained.

Now, the distinction between that case and this is very plain.

There is no attempt here to deny the debt, but only to confine the creditor to his rightful remedy. Let us then see if this attempt be liable substantially to the objection which would exclude the defence of *ultra vires*, and ought to exclude any similar defence; that is, had the creditor the means of knowing that his debt was subject to the condition now sought to be imposed?

In the National Bank act, section 5202, creates two classes of debts. *First*, those debts comprised under the four enumerated heads for which the bank without limitation is responsible, and, *second*, all other debts for which the bank is responsible only to the extent of its assets. The second class as well as the former are valid debts, and must be paid if the property of the corporation will pay them. There is no prohibition to contract debts. The creditor to any amount stands in precisely the same situation of every creditor dealing with an ordinary corporation, he looks to its property alone as the means of securing his debts.

The creditor undoubtedly had, "upon comparing the act done with the laws of the charter," to use the language of the court in 22 N. Y., notice that his recourse for payment was not confined to the property of the bank.

What was the act done? It was lending money to the bank; advancing money to the bank at its request. Compare this "act done" with the terms of the charter, and the charter is found to declare, in express terms, that this act done imposes no liability on the bank which its assets will not meet.

What has then the creditor to complain of? Not that he did not know he was to be restricted to the assets of the bank for payment, but only that he did not know how much he could get out of them, an uncertainty which accompanies every transaction, public and private, individual and corporate, when credit is given.

The N. H. case is authority for the position that the creditor will be bound by any notice which a comparison of the act done with the terms of the charter will convey, and in the present case we hold that when the act of advancing money is compared with the terms of the charter it is seen that for a debt thus credited the liability is confined to the property of the bank.

Did not Hambro & Son know when they advanced the bank $100,000 that their demand against the bank was not for notes of circulation, or deposits, or bills drawn against money, or dividends? And did not the charter then tell them that their demand being for none of these the bank was not liable beyond its assets?

The words of the act are that the association shall not, *at any time*, be indebted or, *in any way*, *liable* to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished, &c.

The act, then, is not directory; it does not forbid the association to *become* indebted—to contract debts—but declares that it shall not *be* indebted or "*in any way liable.*"

That is, what the capital stock will not pay, whenever the demand may be made, the association shall not be indebted for on account of such demand. And yet the plea avers and the demurrer admits that it is to pay such demands that the sum claimed in the declaration is to be exacted from the defendant.

Conclusion.

We submit the demurrer to the two pleas should be overruled.

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